TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 513

SAMUEL HOFFMAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 25, 1951.

CERTIORARI GRANTED MARCH 12, 1951.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fols. 1-2]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,308

UNITED STATES OF AMERICA

vs.

SAMUEL HOFFMAN, Appellant

Appeal from the Order of the District Court of the United States for the Eastern District of Pennsylvania. Miscellaneous No. 1404

Appendix to Brief of Appellant

[fol. 3] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

RELEVANT DOCKET ENTRIES

October 5, 1950. Petition to adjudge witness to be guilty of criminal contempt, filed. Hearing on petition to adjudge witness guilty of contempt. Eo die: The Court finds Samuel Hoffman guilty of contempt. Sentence: Imprisonment for five months. Order of court adjudging witness to be in contempt and commitment, filed. Commitment exit. Notice of appeal by Samuel Hoffman, filed 10/5/50. Copy to Max H. Goldschein. In open Court; Bail denied pending appeal. Clerk's statement of docket entries forwarded to U.S. Court of Appeals and copy filed.

October 20, 1950. Petition for reconsideration of allowance of bail pending appeal filed.

October 23, 1950. Transcript of hearing on October 3, 1950, filed. Transcript of hearing on October 4, 1950, filed. Transcript of hearing on October 5, 1950, filed. Hearing on motion for admission to bail C.A.V.. In open Court: Ordered that defendant be released in bail in sum of $10,000, pending appeal.

October 24, 1950. Bond of defendant in sum of $10,000 filed.

[fol. 4] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PHILADELPHIA, PENNSYLVANIA

In the matter of THE GRAND JURY, WITNESS SAMUEL HOFFMAN

Criminal Contempt, Rule 42(a), Federal Rules of Criminal Procedure

PETITION

Comes Max H. Goldschein, Special Assistant to the Attorney General of the United States and by direction of the Court respectfully presents:

That on the 14th day of September, 1950 the Grand Jury of the United States of America for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania, duly impaneled and sworn undertook an Investigation concerning frauds upon and conspiracies to defraud the Government of the United States, involving violations of the Customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses.

In pursuance of such inquiry it became necessary for said Grand Jury to inquire into and ascertain the facts from various and sundry witnesses who appeared before said Grand Jury and testified, and others who have been and will be subpoenaed to appear and testify.

In accordance therewith, Samuel Hoffman was subpoenaed and appeared as a witness before said Grand Jury [fol. 5] on October 3, 1950 and there arbitrarily refused to answer certain questions propounded to him, claiming that his answers thereto may tend to incriminate him. Thereafter, on the same day he appeared with his counsel before the Honorable J. Cullen Ganey, United States District Judge for the Eastern District of Pennsylvania in open Court, where the claim of privilege of the said witness, Samuel Hoffman, was challenged by the Government. The Court heard the questions propounded to the witness and the answers he made thereto. The Court after hearing argument of counsel for the witness found that there was no real and substantial danger of incrimination to the said

witness, Samuel Hoffman, and ordered him to return before the Grand Jury and answer the said questions which he had refused to answer, namely:

1. Q. What do you do now, Mr. Hoffman?
   A. I refuse to answer.
2. Q. Have you been in the same undertaking since the first of the year?
   A. I don't understand the question.
   Q. Have you been doing the same thing you are doing now since the first of the year?
   A. I refuse to answer.
3. Q. Do you know Mr. William Weisberg?
   A. I do.
   Q. How long have you known him?
   A. Practically twenty years, I guess.
   Q. When did you last see him?

[fol. 6] A. I refuse to answer.

4. Q. Have you seen him this week?
   A. I refuse to answer.
5. (Q. Do you know that a subpoena has been issued for Mr. Weisberg?
   A. I heard about it in Court).
   Q. Have you talked with him on the telephone this week?
   A. I refuse to answer.
6. Q. Do you know where Mr. William Weisberg is now?
   A. I refuse to answer.

That on the 4th day of October, 1950 said witness, Samuel Hoffman, stated in open Court in the presence of his counsel that he would not obey the order of this Honorable Court and answer the questions that the Court directed him to answer as hereinabove set out. This refusal was made to Judge J. Cullen Ganey, presiding.

It is further shown to the Court that Samuel Hoffman, a witness before the said Grand Jury, has refused to answer the aforesaid questions propounded to him before said Grand Jury; that each of said questions was proper and material to the Grand Jurors' inquiry and that no one or all of said questions would tend to incriminate the said witness for a violation of a Federal Statute as has been adjudged by this Court.

It is, therefore, shown that the said witness, Samuel

Hoffman, has given obstructive and contumacious answers to each of the questions propounded to him before the said Grand Jury and he has willfully, deliberately and con-
[fol. 7] tumaciously shut off the search for truth, thwarted the investigation of this Grand Jury in the matter hereinbefore set out, and obstructed the administration of justice.

That the said witness, Samuel Hoffman, has wilfully, deliberately and contumaciously disobeyed and resisted the lawful order and command of this Honorable Court in the direct presence of the Court by willfully and deliberately stating to the Court that he refused to obey the Order of this Court to answer before the Grand Jury the aforesaid questions.

It is, therefore, respectfully prayed that this Honorable Court invoke its punitive power against the said witness, Samuel Hoffman, to preserve the authority and vindicate the dignity of the Court, in order to maintain the proper functioning of the Court and the Grand Jury, and that this Honorable Court exercise its authority to punish for direct defiance of the Order of this Court and contempt thereof, and that its power to punish may serve as a deterrent to others who would defy the processes of this Court who may be inclined to obstruct the business of this Court and the Grand Jury.

M. H. Goldschein, Special Assistant to the Attorney General; Justinus Gould, Special Assistant to the Attorney General; Drew J. T. O'Keefe, Special Assistant to the Attorney General.

[fol. 8] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PHILADELPHIA, PENNSYLVANIA

In the Matter of the Grand Jury WITNESS SAMUEL HOFFMAN

Criminal Contempt, Title 18, USC, Section 401, Rule 42(a) Fed. Rules Crim. Proc.

ORDER OF CONTEMPT—October 5, 1950

In the matter of Contempt of Samuel Hoffman committed in open Court.

Whereas, on the third day of October in the Year 1950, in open Court and in the presence of the Judge thereof,

to wit, Judge J. Cullen Ganey, during the session of said Court and while the said Court was engaged in the regular business of hearing and determining causes pending before it, one Samuel Hoffman was guilty of misbehavior in the presence and hearing of said Court.

That the said Samuel Hoffman was subpoenaed and appeared as a witness before a Grand Jury of this Court on October 3, 1950, which Grand Jury was conducting an investigation concerning the violations of the criminal laws of the United States, and there refused to answer certain questions propounded to him, claiming that his answers thereto may tend to incriminate him. Thereafter, on the same day he appeared with his counsel before J. Cullen Ganey, United States District Judge for the Eastern District of Pennsylvania in open Court, where the claim of privilege of the said witness, Samuel Hoffman, was challenged by the Government. The Court heard the questions propounded to the witness before the Grand Jury and the [fol. 9] answers he made thereto. The Court after hearing argument of counsel for the witness found that there was no real and substantial danger of incrimination to the said witness, Samuel Hoffman, for a Federal offense and ordered him to reappear before the aforesaid Grand Jury and answer the above mentioned questions which he had refused to answer, namely:

1. Q. What do you do now, Mr. Hoffman?
   A. I refuse to answer.
2. Q. Have you been in the same undertaking since the first of the year?
   A. I don't understand the question.
   Q. Have you been doing the same thing you are doing now since the first of the year?
   A. I refuse to answer.
3. Q. Do you know Mr. William Weisberg?
   A. I do.
   Q. How long have you known him?
   A. Practically twenty years, I guess.
   Q. When did you last see him?
   A. I refuse to answer.
4. Q. Have you seen him this week?
   A. I refuse to answer.
5. (Q. Do you know that a subpoena has been issued for Mr. Weisberg?

A. I heard about it in Court).

Q. Have you talked with him on the telephone this week?

A. I refuse to answer.

[fol. 10] 6. Q. Do you know where Mr. William Weisberg is now?

A. I refuse to answer.

That on the fourth day of October in the Year 1950, the said Samuel Hoffman, stated in open Court and in the presence of his counsel that he would not obey the Order of this Court and answer the questions which the Court directed him to answer as hereinabove set forth, thereby thwarting the investigation of the said Grand Jury and obstructing the administration of justice.

That, therefore, the said Samuel Hoffman has willfully, deliberately and contumaciously disobeyed and resisted the lawful Order and command of this Court by refusing to answer the aforesaid questions before the Grand Jury.

And, therefore, the said Samuel Hoffman was guilty of a contempt of this Court by misbehavior in its presence and by a forcible resistance in the presence of the Court to a lawful Order thereof in the manner aforesaid:

Now, therefore, be it Ordered and Adjudged by this Court that the said Samuel Hoffman by reason of said acts was and is Guilty of Contempt of the authority of this Court committed in its presence on the third day of October, in the Year 1950.

And it is further Ordered that the said Samuel Hoffman be punished for said contempt by undergoing imprisonment for five (5) months.

And it is further Ordered that this Judgment be executed by Samuel Hoffman in —— until the further Order of this Court, but not to exceed 5 months.

[fol. 11] And it is further Ordered that a certified copy of this Order under the Seal of the Court be process and warrant for executing this Order.

Dated October 5, 1950.

J. Cullen Ganey (S.), District Judge.

[fol. 12] IN UNITED STATES DISTRICT COURT

EXCERPT FROM TESTIMONY OF HEARING ON OCTOBER 3, 1950 (pages 76-77).

Mr. Gray: Will Your Honor allow the record to note—so that it won't be necessary for him to go back and say that he declines to answer on the ground that it might incriminate him of a Federal offense—that Your Honor's opinion is upon the assumption that that answer appears, otherwise it is necessary for him to go back and be brought back before Your Honor again.

The Court: I see no objection to that being put on the record.

Mr. Gray: You see no objection to that?

Mr. Goldschein: No

[fol. 13] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

PETITION FOR RECONSIDERATION OF ALLOWANCE OF BAIL PENDING APPEAL

The petition of Samuel Hoffman, by his attorneys, Gray, Anderson, Schaffer & Rome, respectfully represents:

1. Petitioner was subpoenaed to appear and testify befor the Special Grand Jury sitting in the Eastern District of Pennsylvania.

2. In response to said subpoena, petitioner appeared on September 14, 1950.

3. On October 3, 1950, your petitioner was called as a witness, and testified inter alia, as set forth in Exhibit "A", attached hereto and made part hereof.

4. Thereafter, on October 4, 1950, your petitioner was summoned before the Court and persisted in his refusal to answer the said questions on the ground that he might incriminate himself as to a federal offense.

5. Upon presentment for contempt, your petitioner was found guilty and sentenced to a term of five months on October 5, 1950.

[fol. 14] 6. Your petitioner was committed to the County

Prison and is presently at Moyamensing Prison in Philadelphia.

7. Your petitioner believes and therefore avers, that on the basis of the facts contained in his affidavit, attached hereto and marked Exhibit B, he was justified in his refusal to answer the questions as aforesaid, or, in any event, that there is so substantial a question involved that your petitioner should be released on bail pending the determination of that question by the Court of Appeals for the Third Circuit to which your petitioner has appealed.

Wherefore, your petitioner prays that he be released on bail pending his aforesaid appeal.

Gray, Anderson, Schaffer & Rome, by (S.) Wm. A. Gray, Attorneys for Petitioners.

[fol. 15] EXHIBIT "A" TO PETITION

1. Q. What do you do now, Mr. Hoffman?
   A. I refuse to answer.
2. Q. Have you been in the same undertaking since the first of the year?
   A. I don't understand the question.
   Q. Have you been doing the same thing you are doing now since the first of the year?
   A. I refuse to answer.
3. Q. Do you know Mr. William Weisberg?
   A. I do.
   Q. How long have you known him?
   A. Practically twenty years, I guess.
   Q. When did you last see him?
   A. I refuse to answer.
4. Q. Have you seen him this week?
   A. I refuse to answer.
5. Q. Do you know that a subpoena has been issued for Mr. Weisberg?
   A. I heard about it in Court.
   Q. Have you talked with him on the telephone this week?
   A. I refuse to answer.
6. Q. Do you know where Mr. William Weisberg is now?
   A. I refuse to answer.

[fol. 16] EXHIBIT "B" TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PHILADELPHIA, PENNSYLVANIA

[Title omitted]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Samuel Hoffman, being duly sworn according to law, deposes and says the following:

1. He is the petitioner in the foregoing petition for the allowance of bail.

2. He assumed when he refused to answer the questions involved before the Grand Jury, that both it and the Court were cognizant of, and took into consideration, the facts on which he based his refusals to answer.

3. He has since been advised, after his commitment, that the Court did not consider any of said facts upon which he relied and, on the contrary, the Court considered only the bare record, as contained in Exhibit A, attached to said petition.

4. In the interest of justice and particularly in aid of a proper determination of the above petition, he submits the following in support of his position that he genuinely feared to answer the questions propounded:

[fol. 17] (a) This investigation was stated, in the charge of the Court to the Grand Jury, to cover "the gamut of all crimes covered by federal statute". (See appendix 1)

(b) Affiant has been publicly charged with being a known underworld character, and a racketeer with a twenty year police record, including a prison sentence on a narcotics charge. (See appendix 2)

(c) Affiant, while waiting to testify before the Grand Jury, was photographed with one Joseph N. Bransky, head of the Philadelphia office of the United States Bureau of Narcotics. (See appendix 3)

(d) Affiant was questioned concerning the whereabouts of a witness who had not been served with a subpoena and for whom a bench warrant was sought by the Government prosecutor. (See appendix 4)

5. On the basis of the above public facts as well as the facts within his own personal knowledge, affiant avers that he had a real fear that the answers to the questions asked by the Grand Jury would incriminate him of a federal offense.

And further affiant sayeth not.

(S.) Samuel Hoffman.

Sworn to and subscribed before me this 19th day of October, 1950, A. D. (S.) Nettie E. Smith, Notary Public. My com. expires Feb. 7, 1951.

Gambler Called In Racket Probe

Cappy Hoffman Among First Three Witnesses

Samuel (Cappy) Hoffman, a gambler with a 20-year police record, and two other witnesses were summoned today before the federal grand jury investigating rackets here and in nine nearby counties.

All three appeared at the Federal Building in answer to subpenas and waited while U. S. District Judge J. Cullen Ganey swore in the 19 jurors and delivered his charge.

The court told the jurors that the rackets they have been called to investigate are "a blight" that could destroy "the democratic process, the American way of life."

Hoffman and the two other witnesses were still waiting when Max H. Goldschein, special deputy attorney general who is directing the probe, took the jurors to their third floor headquarters.

Attorney Comes Along

The other waiting witnesses were Harry Segal, of Florence av. near 56th, and Samuel Lit, of Pine st. near 48th. Goldschein said they and Hoffman would be questioned about gambling. Hoffman and Segal were accompanied by Lester Schaffer, an attorney from the office of William A. Gray.

Levi C. Hershey, a grocer of Elizabethtown, Lancaster County, was named the jury foreman. Dr. Herman G. Nailor, of 425 W. Chelten av., a dentist, was named deputy foreman. The jury was chosen from a panel of 34. Fifteen were excused.

Hoffman's record includes a conviction and prison sentence on narcotics charges, an acquittal for

Continued on Page 18, Col. 1

Gamblers Called in Probe

Continued from First Page

murder, and innumerable arrests on gambling charges.

His early operations were out of Atlantic City and he was once described by top Philadelphia police officials as "the king of the shore rackets who lives by the gun."

Named With Nig Rosen

More recently they named him and Nig Rosen as two of the men trying to "organize" the numbers racket in this area. Last August, the Senate crime investigating committee put Hoffman's name on a list of "known gangsters" from the Philadelphia area who made the Sands Hotel, Miami Beach, their headquarters.

Hoffman's murder acquittal was in 1942 at Mays Landing. A jury found him not guilty of the murder of Michael Tenerelli, alias Mickey Blair, a former fighter, who was shot six times in the back outside his Pleasant Bay Inn in Atlantic City. Hoffman charged he was "framed."

'Solemn Duty'

In his charge, Judge Ganey told the jurors:

"You have been called to the performance of what I feel is a very solemn duty. You have been singled out of the electorate of this district to look into certain matters which the attorney general will bring to your attention.

"In the hurly-burly of life and its complex economic, financial and political complexities, we overlook the structure which holds up this great system of our American way of life. Too often we forget that it is on this structure that all of the very many fine things which we enjoy today are predicated.

"Our democratic process is the envy of the world. Here all men appear before the court free and equal, no matter what their rank, their situation in life, their birth. We are one of the few cases in the world where liberty and freedom are really concrete measures which each of us can utilize to bring to the fulfillment of our every wish and event want and it is important that the wellsprings of the democratic process be kept intact, pure and undefiled.

Rackets a 'Blight'

"We must not let infiltrate into the democratic process anything which will harm or degrade it, and seeto it that it is kept vigorous and alive.

"If rackets infest or encrust our system of government, just as any blight attacks any other growth, it withers and dies. The wellspring of the democratic process will also dry up.

"They (rackets) do not serve the wishes and wants and intents of the democratic process, the American way of life.

"For that reason, the attorney general's office has come into this district to conduct an investigation on the conditions that prevail here. I do not know the exact form of the investigation will take. I do know the conduct of the grand jury investigation will run the gamut of all crimes covered by federal statute.

"Therefore there descends upon your shoulders a rather solemn duty. I don't think that there is any responsibility that carries a greater dignity than sitting in judgment of your fellow man. It is your duty to take this keenly, be alert about, it, and give it your best."

Judge Ganey described the duties of a grand jury and what its limitations were, explaining that the result of its investigation would be either indictments, a report, or neither.

Goldschein said that the investigation will include allegations made against one GI school and veterans attending another.

In the one case, Goldschein said, the grand jury will look into reports that a GI school, with only 60 veterans attending, was receiving monthly government checks for the tuition of 380.

Veterans Face Charges

In the other, Goldschein added, the grand jury will hear testimony from witnesses who allege that a large number of veterans attending a GI school spent only five minutes there each day to report themselves present and then left.

In this case the grand jury will examine the possibility of bringing charges against the veterans who were receiving subsistence allotments from the Government.

The investigation is to run the full gamut of all the rackets, including illegal drugs, bootlegging, gambling, smuggling, white slavery, and their offshoots.

Goldschein said that 20 subpenas were in the first batch to go out, but that nine of these remain unserved.

"We are having trouble finding some big shots," he said.

Others Listed

The other members of the grand jury are:

Charles R. Allabach, 3436 Princeton av., insurance agent; Mrs. Anna L. Dill, 407 E. Wadsworth st., housewife; Mrs. Floy M. Edson, Bethlehem, housewife; Harry V. Farrall, 5537 Greenway av., retired; Mrs. Marion V. Hansell, Mechanicsville, Bucks County, housewife; Leonard Hatfield, Pottstown, dealer; Miss Evelyn M. Hays, 1716 Spruce st., cosmetician.

Mrs. Eva S. Hess, Collegeville, housewife; Mrs. Anna M. Keller, Denver, Lancaster County, housewife; Mrs. Gertrude McLeod, 1908 N. 22d st., dressmaker; Mrs. Georgia W. Potter, 105 W. Willow Grove av., housewife; Archie T. Richards, 810 Prospect av., Prospect Park, retired; Mrs. Marie K. Selby, Alden Park Manor, Germantown, housewife;

Edward P. Stevenson, 136 W. Mt. Airy av., clerk; John J. Weidemayer, 811 W. Huntingdon st., machinist; Mrs. Anna M. Wendell, 205 Comly st., housewife, and Mrs. Mildred J. Williams, 662 Arbor road, Yeadon, housewife.

10/4/50

Hoffman Faces Contempt Action

Balks at Questioning In Racket Inquiry

Samuel (Cappy) Hoffman faces contempt of court proceedings today unless he has a change of heart about answering questions before the federal grand jury investigating rackets here.

Hoffman, long known to police as an underworld character, has been ordered to appear before U. S. Judge J. Cullen Ganey if he persists in refusing to answer.

His attorney, William A. Gray, indicated that Hoffman will continue to refuse to do so on the grounds of possible self-incrimination.

Runs Risk of Jail

If Hoffman is cited for contempt, he may be jailed. It would be the first contempt charge brought against any of the more than 30 witnesses who have appeared so far in 14 days before the grand jury.

At the request of Max H. Goldschein, federal prosecutor, Judge Ganey yesterday ordered Hoffman to answer the questions. They involved William Weisberg, of 50th st. near Spruce, one of a number of witnesses for whom Goldschein has asked body attachments because their whereabouts are unknown and they cannot be served with subpenas.

The questions asked Hoffman were: "What do you do now? Have you been in the same business since the first of the year? Do you know Mr. Weisberg? When did you see him last? Have you seen him this week? Have you talked to him on the telephone? Do you know his whereabouts?"

He Fails to Return

As Hoffman left the grand jury anteroom yesterday after being ordered by Judge Ganey to answer the questions, some of his friends, also witnesses before the grand jury, asked him if he would return after the noon recess.

"I'll most likely be in jail tomorrow," Hoffman said angrily. "Why should I spend my afternoon here?" He did not return.

Hoffman's police record includes a prison sentence on a narcotics charge, an acquittal on a murder charge, and numerous arrests for gambling.

Two central city ticket brokers were subpenaed to testify before the grand jury. They are Philip Glassman and his brother, Oscar.

Philip has a ticket brokerage business on Sansom st. near 15th and operates a taproom at that address. He is also active as a sports promoter. Oscar operates a ticket business on 13th st. near Locust.

U. S. Will Cite Hoffman for Court Contempt

Witness Tells Judge He Won't Tell Probers What His Business Is

Samuel (Cappy) Hoffman, long known to police as an underworld character, refused for a second time today to answer questions put by a federal grand jury investigating rackets here.

Max H. Goldschein, federal prosecutor in charge of the probe, announced that a formal charge of contempt of court will be lodged against Hoffman at 10.30 A .M. tomorrow.

It will be the first time since the jury began its work September 14 that a formal contempt citation has been made against a witness.

Won't Tell About Work

The questions Hoffman refused to answer dealt with the way in which he earns a living and with his possible connection with William Weisberg, one of a number of witnesses for whom Goldchein has asked body attachments because their whereabouts are unknown.

Hoffman, accompanied by his attorney, William A. Gray, appeared today before Judge J. Cullen Ganey.

"I have explained to my client that if he should fail to answer he would be held in contempt," Gray told the court. "He told me he would refuse to answer on the ground it might incriminate him."

Questioning Called Unfair

"That is right," Hoffman interjected.

Gray argued that it was unfair to require Hoffman to answer questions about his business.

"If a man were a counterfeiter and he was asked what his business was, he would be incriminating himself by saying he was a counterfeiter," Gray said.

APPENDIX 2

Racket Witness Balks at Queries

Cappy Hoffman Told By Judge to Answer

Samuel (Cappy) Hoffman, known for many years as an underworld character, was brought before Federal Judge J. Cullen Ganey today for refusal to answer questions put by the special rackets grand jury.

Ganey ordered Hoffman to answer, but William A. Gray, attorney for Hoffman, indicated that his client might persist in his refusal.

"I will consult my client, and if he persists in not answering, I will notify your honor," Gray told the court.

Hoffman's criminal record includes a prison sentence on a narcotics charge, an acquittal on a murder charge and numerous arrests for gambling.

Fears Self-Incrimination

The questions Hoffman refused to answer involved William Weisberg, of 50th st. near Spruce, one of eight witnesses for whom Max H. Goldschein, federal prosecutor, has asked body attachments, on the ground that their whereabouts are unknown and they cannot be found for the service of subpenas.

The questions asked Hoffman were: "What do you do now? Have you been in the same business since the first of the year? Do you know Mr. Weisberg? When did you see him last? Have you seen him this week? Have you talked to him on the telephone? Do you know his whereabouts?"

The refusal to answer was based on the possibility of self-incrimination. Judge Ganey ruled that the questions involved no such risk for Hoffman.

Gray argued that it was improper to ask one witness the whereabouts of another. The line of questioning directed at Hoffman, Gray said, might eventually involve income tax matters and expose his client to self-incrimination.

Judge Ganey set Thursday at 10 A. M. for a hearing on an application by Goldschein for body attachments for two witnesses; Joseph Gergenti, of Randolph st., Camden, and Joseph Coffey, of Marston st., near Reed.

A body attachment is similar to a bench warrant, except that when an attachment is issued, the person named cannot be freed under bail, as he can be under a bench warrant.

APPENDIX 3 to AFFIDAVIT

THE SUNDAY BULLETIN, PHILADELPHIA, SUNDAY MORNING, SEPTEMBER 24, 1939

Racket Witnesses Wait and Wait (And Get the Willies) at $4 a Day

Samuel (Cappy) Hoffman (left), erstwhile bigtime gambler, is one of Uncle Sam's involuntary $4-a-day annuitants at the grand jury racket investigation. He's passing the time chatting (apparently in a sort of "who me?" vein) with Joseph N. Bransky, head of local U. S. Bureau of Narcotics

EVENING BULLETIN 9/29/53

8 U.S. Warrants Asked in Probe

9/28/50

Men Wanted in Racket Quiz Can't Be Found

Max H. Goldschein, special federal prosecutor of the rackets probe here, today sought bench warrants for eight men on whom he has been unable to serve subpenas for grand jury appearance.

William A. Gray, appearing as attorney for some of the eight men, objected to issuance of the warrants on the ground that they would be improper unless the men sought had first been served with subpenas and had refused to honor them.

Judge J. Cullen Ganey took the issue under advisement.

Goldschein told the court he wanted warrants for eight who were subpenaed ten days ago "and whose whereabouts are still unknown."

Gray Intervenes

Gray immediately intervened. He did not name his clients but said that he had represented some of the men sought in the past and wanted to defend their rights.

"It has never been known for a court to issue an attachment for a man who has not actually been served," Gray said. "Just because Mr. Goldschein says he cannot find a man, it doesn't mean that the man is evading him, nor is it grounds for "bench warrant."

Ganey commented that the Gray argument had "a lot of merit." Ganey instructed Goldschein to prepare formal petitions for the bench warrants. The judge said he would rule when the petitions were submitted, adding that "the reasons for them must be substantial before they are allowed."

8 Sought [illegible]

The eight named by Goldschein for warrants are:

James Singleton, for whom two addresses were given—Hollywood st. near Federal and Fitzgerald st. near 24th; Joseph Coffey, of Manton st. near 16th; three borthers, Michael and Salvatore Matteo, of Manton st. near 4th, and Frank Matteo, of Clover lane, Upper Darby; William Weisberg, of 50th and Spruce; Joseph Gergenti, of Randolph st., Camden, and Michael Switz, of Waverly st. near 25th.

The application for the warrants came shortly after Frank (Blinky) Palermo sought a court order to quash a subpena requiring him to testify before the grand jury.

Palermo, publicly tagged by police as the city's "numbers king," was the first of 28 witnesses to resist testifying before the grand jury.

Early in the probe, which began September 14, several declined to answer questions put by the investigating staff until they had been ordered to do so by Federal Judge J. Cullen Ganey, but none sought to nullify a subpena.

Contends Name Isn't Disclosed

Through his attorney, Jacob Kossman, Palermo filed a petition asking the court to quash and set aside his subpena on the ground that it "does not disclose the name or names of the persons against whom the inquiry is instituted nor the subject of the investigation."

Kossman said the subpena, made on a postal card, is headed "U. S. vs. Grand Jury."

"Under the law," Kossman said, "any subpena compelling a witness to appear before a grand jury must disclose the name or names of persons against whom the investigation is instituted, or the subject of the investigation. I suppose we are supposed to know from the newspapers why our man is supposed to appear, but that is not the law."

Goldschein argued in opposition to the Kossman petition that the right of the grand jury to summon witnesses without naming the defendants in the probe is well established. Ganey set Tuesday for the submission of briefs on the issue.

He's Waited Since Tuesday

Palermo was on hand in the Federal Building today in answer to the subpena that has required him to appear daily since last Tuesday.

Palermo was arrested earlier this month, along with Singleton and Coffey, as the aftermath of a bloodless gun battle reportedly stemming from a numbers racket dispute. The charges against them were dismissed when no witnesses appeared to testify.

Clarence J. Malehorn, of Phoenixville, who with his brother operates a wire communication service in Camden, was brought before Judge Ganey by Goldschein after he refused to answer questions put to him by the grand jury. The questions dealt with the telephonic equipment maintained by Malehorn at his Camden headquarters.

Ganey told Malehorn the answers to such questions could not incriminate him. Malehorn replied that "I have no guarantee the answers would not be made public." He maintained that stand after Ganey told him that grand jury proceedings were secret and no testimony would be made public.

Ganey instructed Malehorn to appear in court with his attorney for an official ruling later today.

[fol. 23] **Supplemental Appendix to Brief of Appellant**

EXCERPT FROM TRANSCRIPT OF HEARING, OCTOBER 4, 1950

(P. 87) Mr. Gray: * * * Before that is done, while Your Honor was, and you always are, sir, extremely patient in listening to the presentation I made yesterday in the matter, I would like to emphasize one fact that I put yesterday to Your Honor, and that is when this man was asked what was his business, I argued to Your Honor that he would have the right to refuse to answer on the ground that it might incriminate him of a Federal offense. I now put the hypothetical question to Your Honor, suppose this man was engaged in counterfeiting?

If he answers the question, he answers it truthfully, and if he does not answer it truthfully, he will be subjected to the penalities of perjury. If he answers it truthfully, he certainly is incriminating himself of having been guilty of an offense under the United States Law.

The Court: What do you say to that, Mr. Goldschein?

Mr. Goldschein: I say that is like saying that a man who breaks into a bank and steals the money does not have to file an income tax return because he might say that he stole the money; or the man who says he does not have to answer whether he ever used the mail, because it may be presumed that he had at some time used the mail to defraud; that he did not have to answer whether or not he ever wrote a letter to John Doe or Bill Smith, because there may have [fol. 24] (P. 88) been something in that letter that is not true, and he may have violated the statutes with relation to mail fraud.

No, may it please the Court, I don't think that any witness can stand before the Grand Jury and say that he refuses to answer a question that is as simple and as plain as that one, and have the Court read into it the fact that he refuses to answer the question because he may have violated some Federal statute.

Mr. Gray: I don't think that is a parallel——

Mr. Goldschein: I think, may it please the Court, that before a witness can be given privilege against self-incrimination that the obvious answer to the question must be such that the Court can determine from the question, if the question is answered in the affirmative, that it would in-

criminate him. Other than that, the witness must give the Court sufficient so that the Court can determine.

The Court: Yes, I think that is right. I ask, what is your job——

Mr. Gray: May I say, before that——

The Court: Excuse me, Mr. Gray. That may be laid in an environment and under such circumstances from which the only inference that can be drawn—I cannot say that he is a counterfeiter—I think I have the right to presume he is engaged in a lawful occupation.

(P. 89) Mr. Gray: My friend does not answer the question and Your Honor does not answer it. Suppose the man is in the counterfeiting business. He is asked the [fol. 25] question, What is your business?

He knows he is a counterfeiter; it is his only business; he cannot answer the question because it would incriminate him. What can he say? He cannot say, "I refuse to answer the question because I am in the counterfeiting business, or I refuse to answer the question because it might incriminate me under the Federal laws; he happens to be a counterfeiter. What are you going to do about that?

The Court: I know, but the whole background—I think it must be laid in a background from which the Court can glean that he is in the counterfeiting business. The mere asking of the question, "What business are you in?"——

Mr. Gray: Well, he is in the counterfeiting business.

The Court: —does not warrant the assumption that he is in the counterfeiting business. He may be in the counterfeiting business. I have to go one step further, don't I, and make the assumption, don't I, that he is in the counterfeiting business or may be——

Mr. Gray: No, not at all. He is actually in the counterfeiting business. He is actually in the business.

(P. 90) The Court: I don't know that.

Mr. Gray: You don't know that, but he knows it in his own mind. How is he going to do more than say, "I refuse to answer on the ground that it may incriminate me"? He cannot explain that he is in the counterfeiting business, and [fol. 26] that is why it would incriminate him, because he is then incriminating himself.

The Court: All right, let us take myself. Suppose I were summoned before the Grand Jury; they say, "What is your business?" I say, I refuse to answer on the ground of self-incrimination.

Mr. Gray: Your illustration——

The Court: I don't know. I don't know what Hoffman does.

Mr. Gray: Your illustration is not very good. It has been broadly published that this man has a police record——

The Court: I don't know it.

Mr. Gray: —that he is not a character that belongs on the bench, or a character that belongs at the bar.

The Court: That I really don't know.

Mr. Gray: Wait; that is no answer to the fact that he may be in the counterfeiting business, and being in the counterfeiting business, if he makes any other explanation (P. 91) than refusal to answer on the ground that it may incriminate him——

The Court: You say it is widely known—has it been in the newspapers that he is in the counterfeiting business?

Mr. Gray: No, sir.

The Court: I am going to sustain——

[fol. 27] Mr. Gray: Will Your Honor allow this argument to be made of record the same as yesterday?

The Court: Yes, sir; yes, indeed.

Mr. Gray: Will Your Honor allow something else to be placed on record? I don't know that it is there—that there has been a subpoena issued for Weisberg some several weeks ago and that he has not appeared in answer to the subpoena?

The Court: If that is the fact.

Mr. Goldschein: Those are facts.

[fols. 28-29] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,308

UNITED STATES OF AMERICA

vs.

SAMUEL HOFFMAN, Appellant

ORDER AS TO BRIEFS AND APPENDICES—October 25, 1950

Present: Biggs, Chief Judge, and Kalodner, Circuit Judge

It is Ordered that the parties in the above-entitled case be, and they are hereby granted leave to file typewritten briefs and appendices.

It is further Ordered that the case be set down for oral argument on November 6, 1950.

By the Court, Kalodner, Circuit Judge.

October 25, 1950.

[File endorsement omitted.]

[fol. 30] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MOTION BY THE UNITED STATES OF AMERICA TO STRIKE FROM THE RECORD ON APPEAL THE APPELLANT'S PETITION IN THE DISTRICT COURT FOR RECONSIDERATION OF ALLOWANCE OF BAIL—Filed November 3, 1950

The United States of America moves that the Appellant's Petition for Reconsideration of Allowance of Bail pending appeal, be stricken from the record on appeal, and for cause shows:

1. That on October 5, 1950, the Appellant, Samuel Hoffman, was found Guilty of Criminal Contempt and sentenced by the United States District Court for the Eastern District of Pennsylvania to imprisonment for a term of five months.

2. That on the same day, October 5, 1950, the attorney for the said Samuel Hoffman made a Motion for bail pending appeal, which Motion was denied by the Court below.

[fol. 31] 3. That on the same day, October 5, 1950, the said Samuel Hoffman, appealed to this Court, and on October 6, 1950, the entire record of the proceedings in the Court below were sent to this Court and were accepted for docketing on October 11, 1950 after the said Appellant had paid the requisite fee to the Clerk of this Court.

4. That, thereafter, on October 20, 1950, the said Samuel Hoffman filed in the District Court a Petition for Reconsideration of Allowance of Bail pending appeal.

5. On October 23, 1950, the United States District Court ordered that the Defendant, the said Samuel Hoffman, be released on bail in the sum of $10,000.00, pending appeal.

6. Thereafter, on October 24, 1950, a so-called "Supplemental Record", consisting of the Appellant's "Petition

for Reconsideration of Allowance of Bail" pending appeal together with Exhibits, Affidavit and additional docket entries were filed in this Court.

7. That such so-called "Supplemental Record" is not a part of the record on appeal, pertaining to the appeal and should not have been transmitted to this Court nor made a part of these proceedings, because it was not offered nor considered by the District Court in the consideration of the merits of the cause, and was considered by the Court below for only one purpose, namely, bail pending appeal, and after the appe l had been taken and after the entire record had been filed in this Court.

[fol. 32] Therefore, the United States of America moves that the so-called "Supplemental Record" consisting of the Defendant's Petition for Reconsideration of Allowance of Bail Pending Appeal, together with its accompanying exhibits and affidavit and with the additional docket entries be stricken from the records of this Court, as such so-called "Supplemental Record" is not a proper part of the Record on Appeal.

M. H. Goldschein, Special Assistant to the Attorney General; Justinus Gould, Special Assistant to the Attorney General; Drew J. T. O'Keefe, Special Assistant to the Attorney General; Vincent P. Russo, Special Assistant to the Attorney General, Attorneys for the United States of America, Appellee.

[fol. 33] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER GRANTING MOTION TO STRIKE—December 8, 1950

Upon consideration of the motion by appellee to strike from the record on appeal appellant's Petition in the District Court for reconsideration of allowance of bail, and after hearing on the motion,

It is Ordered that the said motion be, and it is hereby granted.

By the Court, Herbert F. Goodrich, Circuit Judge.

December 8, 1950.

[File endorsement omitted.]

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,308

UNITED STATES OF AMERICA,

v.

SAMUEL HOFFMAN, Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued November 6, 1950

Before Goodrich, Kalodner, and Hastie, Circuit Judges

OPINION OF THE COURT—Filed December 8, 1950

By HASTIE, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Eastern District of Pennsylvania adjudging the appellant, Samuel L. Hoffman, guilty of criminal contempt, and sentencing him to imprisonment for five months.

The issue raised is whether the appellant was privileged to refuse to answer certain questions put to him by a federal grand jury on the ground that his answer might incriminate him of a federal offense.

The grand jury in question was duly impaneled and sworn on September 14, 1950, and thereupon undertook an "investigation concerning frauds upon and conspiracies to defraud the Government of the United States, involving [fol. 35] violations of the customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses."[1]

[1] This exact statement was placed before the district court in the government's petition to cite the appellant for contempt filed pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.

Pursuant to subpoena issued by this jury, the appellant, Hoffman, appeared as a witness on October 3, 1950. He refused to answer certain questions propounded to him by the grand jury on the ground that his answers might incriminate him of a federal offense.[2] Subsequently, he appeared before the district court where the claim of privilege was challenged by the government. The court heard the questions propounded to the witness and the answers he made thereto. After hearing argument of counsel for the witness, it found that the witness had been subjected to no real and substantial danger of incrimination for a federal offense, and ordered him to reappear before the grand jury and answer the questions which he had theretofore refused to answer.

The appellant stated in open court and in the presence of his counsel that he would not obey this order. The court thereupon found him guilty of contempt of court by wilful disobedience of its lawful order constituting misbehavior in its presence, and sentenced him.[3]

The only issue before us on this appeal is whether the appellant's claim of privilege was properly overruled.

The questions and answers in issue fall into two groups. The first concerns appellant's occupation, and is as follows:

[fol. 36] "1. Q. What do you do now, Mr. Hoffman?
A. I refuse to answer."
"2. Q. Have you been in the same undertaking since the first of the year?
A. I don't understand the question.
Q. Have you been doing the same thing you are doing now since the first of the year?
A. I refuse to answer."

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[2] The government's petition alleged that his refusal was made on the basis that the answers "might tend to incriminate him". In course of argument, the appellant was apparently allowed to take issue with this orally and assert by way of unwritten answer that he claimed the answers "might incriminate him of a federal offense".

[3] The various proceedings before the court leading to the sentence actually occurred on three different days. But this is of no importance to the result.

The second concerns appellant's knowledge of the whereabouts of one William Weisberg, and is as follows:

"3. Q. Do you know Mr. William Weisberg?
A. I do.
Q. How long have you known him?
A. Practically twenty years, I guess.
Q. When did you last see him?
A. I refuse to answer."
"4. Q. Have you seen him this week?
A. I refuse to answer."
"5. Q. Do you know that a subpoena has been issued for Mr. Weisberg?
A. I heard about it in Court.
Q. Have you talked with him on the telephone this week?
A. I refuse to answer."
"6. Q. Do you know where Mr. William Weisberg is now?
A. I refuse to answer."

The appellant's claim of privilege not to answer these questions is based on the provision of the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."[4] It was observed very early, however, that the interest of the United States in the testimony of every citizen foreclosed an unbridled application of the privilege. See *United States* [fol. 37] *v. Burr* (*In re Willie*), 25 Fed. Cas. No. 14,694, 38, 39 (1807). Whatever conflict there was in the application of the two interests was thought to have been resolved by Chief Justice Marshall's enunciation of the now famous test: "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be." *United States v. Burr, supra*, 39; see *Mason v. United States*, 244 U. S. 362, 364 (1917); *Camarota v. United States*, 111 F. 2d 243, 245 (3rd Cir. 1940). It is not disputed that this prohibition applies to proceedings before a grand jury of the United States.

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[4] U. S. Const. Amend. V.

Counselman v. Hitchcock, 142 U. S. 542 (1892), *United States v. Monia*, 317 U. S. 424 (1943).

A

The first of two situations where dispute is likely to occur over the application of the Marshall rule is illustrated by the questions directed to appellant with regard to the whereabouts of William Weisberg. It is not claimed by the appellant that the answers to the questions will in themselves incriminate him, but only that they expose him to danger in that they, in conjunction with other information, may lead to revelation that appellant is guilty of a federal offense. The reality of this danger is the matter in dispute upon which the privilege depends.

Where the risk is made apparent and appears substantial, the constitutional proscription has been held applicable. But in cases where the danger is not obvious, decision has depended upon the degree of likelihood of linkage between the probable answer and a crime. *E.g., United States v. Weisman*, 111 F. 2d 260 (2nd Cir. 1940); *United States v. Rosen*, 174 F. 2d 187 (2nd Cir. 1949); *United States v. Zwillman*, 108 F. 2d 802 (2nd Cir. 1940). It may well be [fol. 38] that no more helpful generalization of the degree of likelihood required can be devised than Judge Learned Hand's often quoted statement: ". . . perhaps in the end we should say no more than that the chase must not get too hot; or the scent, too fresh." *United States v. Weisman, supra*, 263.

We do not think appellant's admission that he had seen Welsberg within the week, or had talked to him within the week, or that he knew where he was, or a statement when he last saw him, could come dangerously close to involving him in a federal offense. We cannot see that any answer to this would be likely to differentiate appellant at all or in any significant way from a considerable number of blameless people. It was suggested that he would perhaps be subject to punishment for obstructing justice, pursuant to Sections 371 or 1501 of the Criminal Code.[5] The sole basis

[5] Section 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States or to defraud the United

for this claim is the fact, widely publicized, and known to the witness that a subpoena had been issued but not served requiring Weisberg to appear before this grand jury. However, the relationship between possible admissions in answer to the questions asked appellant and the proscription of those sections would need to be much closer for us to conclude that there was real danger in answering. In the [fol. 39] nature of this problem, analogical comparison of cases is difficult. However, we think it worth noting that any possible answers would, in our judgment, have come no closer to connecting appellant with wrongdoing than the answers which were required by this court in *Camarota v. United States, supra.*

B

A more difficult problem arises in applying to the first group of questions [6] concerning the business of the witness the accepted generality of the Marshall test. It is perfectly

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States, or any agency thereof in any manner of for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 1501. Assault on process server

"Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States, or United States commissioner; or

"Whoever assaults, beats, or wounds any officer or other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such writ, rule, order, process, warrant, or other legal or judicial writ or process—

"Shall, except as otherwise provided by law, be fined not more than $300 or imprisoned not more than one year, or both."

[6] Actually, the first question is the crucial one. The two questions asked thereafter are significant only in the light of the incriminatory possibilities of the answer to the first.

obvious that the questions here permit of direct answers which in themselves would be an admission of federal crime. Appellant has invoked that possibility in his assertion that a statement of "what he does" would tend to incriminate him "on the ground that it would incriminate him of a federal offense". Since the question asked permits an answer admitting federal crime, appellant urges that the court must accept this general assertion of crimination and that further inquiry whether he is in fact engaged in such illegal business is foreclosed. Literally construed Marshall's dictum—" * * * if a direct answer may criminate himself, then he must be the sole judge what his answer would be"—suggests an unqualified privilege to refuse to answer such a question as this. But we think there is one qualification which consists with the privilege and at the same time provides a salutary protection of the public interest in facilitating official inquiries.

The claimant of privilege must show the court enough beyond his bare statement of crimination at least to indicate that his claim was not clearly groundless, a contumacious assertion made in bad faith. In some circumstances, the nature of the question and the common ex- [fol. 40] perience of life may suffice for this purpose.[7] But the question, "What do you do now?" is so frequently asked of witnesses as a mere identifying question that without more a court may well regard it as normally too innocent to fall within the Marshall principle. The danger may not appear sufficiently real.

In this case, the district judge in course of oral argument took the position that he could not assume appellant to be any different from any other private citizen. To him the danger that the answer would reveal more than routine identification did not appear sufficiently real. Therefore, he apparently concluded that this was a case where the burden was on the witness to offer some affirmative indication of the incriminatory possibilities of the question. Cf. *United States v. Rosen, supra; United States v. Weisman,*

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[7] *E.g.*, Alston v. State, 109 Ala. 51, 20 So. 81 (1896) (witness asked "if he did not shoot Dean Edwards"); People v. Spain, 307 Ill. 283, 138 N.E. 614 (1923) (witness in bribery-conspiracy investigation asked whether he gave money to member of legislature).

supra. The witness having failed to do this, the privilege was denied him.

It is now quite apparent that the appellant could have shown beyond question that the danger was not fanciful. At the time of appellant's sentence, the district court was of the opinion that he was not entitled to bail pending appeal. Subsequently, on motion for reconsideration of the matter of bail, the applicant made allegations with respect to his reputation as a racketeer and notorious underworld figure in Philadelphia, and to newspaper articles which tended to support this reputation both generally and by specific allegation of prior conviction under the narcotics laws together with a picture of appellant with a narcotics official. This, we think, would rather clearly be adequate to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy.

This data was included in the record on the contempt appeal. But the government has moved to strike it on the ground that the information offered in support of the bail [fol. 41] motion was not before the court when it found appellant in contempt, and therefore cannot be considered now. We agree and disregard this data.

But, this data aside, was there enough before the district court to suggest that appellant's claim that direct answer to the question "What do you do now?" would be incriminatory was not clearly groundless.

We think that it is somewhat easier to answer this question if we remember that the court, ruling on a witness' claim of privilege against self-incrimination, is merely trying to secure some credible indication other than the word of the witness himself that the privilege is being asserted in good faith. It is certainly normally impossible without removing the privilege itself for the court to have assurance. Simply as a method of accommodating the privilege with the legitimate interest of the government in securing information, the court requires some collateral indication of the good faith of the witness. If the question is innocent on its face, it remains for the witness to call to the court's attention in some appropriate fashion such facts as point to its danger.

So far the members of the Court are in agreement. We divide in applying the discussion already had to the facts of this case. The view of the writer of this opinion is as follows: The court in this case knew the setting of

the controversy. It was a grand jury investigation of racketeering and federal crime in the vicinity. The court should have adverted to the fact of common knowledge that there exists a class of persons who live by activity prohibited by federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation. These considerations indicate a sufficient likelihood of good faith in the claim of privilege to sustain it.[8]

[fol. 42] The majority of the Court, however, disagrees with this conclusion. It believes that the subject-matter of the grand jury's investigation gives no notice to the trial judge of the quality of any particular witness. Many kinds of witnesses come before grand juries and there is no reason for the judge to believe, in the absence of evidence, that any particular witness is so connected with underworld activities that a statement of his occupation will tend to incriminate him. The majority thinks that the witness here failed to give the judge any information which would allow the latter to rule intelligently on the claim of privilege for the witness simply refused to say anything and gave no facts to show why he refused to say anything. Since the judge is and the witness is not the person who is to determine whether the claim of privilege is to be allowed, the majority concludes that the trial judge was right in saying that the witness had shown nothing which entitled him to the privilege which he claimed.

The judgment will be affirmed and the motion of appellee to strike certain portions of the record will be granted.

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[8] Appellant's counsel did call to the court's attention in the course of argument, although in a rather casual way, that appellant had a notorious reputation as an underworld figure. But the writer does not rely on this. See United States v. St. Pierre, 128 F. 2d 979, 981 (2d Cir. 1942) where Judge Frank indicates that the court "must be apprised in some more dependable manner than the mere statement of counsel, how the answer will incriminate the witness before we can allow the suppression of the truth." Nor is this a situation here which imposes upon the court a duty to take judicial notice of reputation. Cf. Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 274-75, 279 (1944).

[fols. 43-44] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,308

UNITED STATES OF AMERICA

vs.

SAMUEL HOFFMAN, Appellant

JUDGMENT—December 8, 1950

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

Ida O. Creskoff, Clerk.

December 8, 1950.

[fol. 45] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REHEARING ON BEHALF OF APPELLANT—Filed December 21, 1950

To the Honorable, the Judges of the Said Court:

The petition of Samuel Hoffman, by his attorneys, Gray, Anderson, Schaffer & Rome, for rehearing in the above entitled case, respectfully represents as follows:

I

This Court recognized that the data furnished to the lower court "would rather clearly be adequate to establish circumstantially the likelihood that appellant's assertion of [fol. 46] fear of incrimination was not mere contumacy", but on the motion of the Government struck said data from the record.

We urge this Court to permit appellant to argue before it the question of remanding the case to the lower court

for the purpose of presenting these data. If it be assumed that appellant and his counsel were in error in failing to call these data to the attention of the court below prior to his sentence, nevertheless serious constitutional questions are raised by this appeal, and consequently we pray for the opportunity to present argument to this Court in support of a remand so that appellant may present this evidence to the Court below in a motion for reconsideration of the sentence.

Appellant's error, it is now apparent from this Court's opinion, was in assuming that the court below was aware of the facts on which he relied for his claim of privilege. His Honor, Judge Hastie, disagreeing with the majority of the Court, stated that the court below knew the setting of the controversy and should have adverted to the fact that witnesses such as appellant would be summoned to testify. Appellant now seeks merely to correct his understandable error and present argument to this Court in support of this position.

Courts are always loath to find that constitutional rights have been waived. As was stated by Mr. Justice Black in *Johnson v. Zerbst*, 304 U. S. 458, 464, 82 L. ed. 1461, 1468 (1938):

> "It has been pointed out that 'courts indulge every reasonable presumption against' waiver of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' "

See also *Boyd v. United States*, 116 U. S. 616; 29 L. ed. 746, 751-752.

Appellant erroneously believed he had adequately protected his constitutional rights. He prays this Court to [fol. 47] give him the opportunity to preserve those rights by hearing argument in support of remanding the case to the court below.

II

This Court found that appellant should have answered the questions concerning the whereabouts of Weisberg. These questions were admittedly designed to aid the Government in its then futile attempts to serve a subpoena on Weisberg. Between the time of appellant's testimony and the application for bail, Weisberg voluntarily appeared. It was then assumed that these questions consequently be-

came moot since the Government did not need the answers for the conduct of its investigation. At all times thereafter it was assumed by all that the first group of questions was the main group to be considered and the Government did not even discuss the matter in its brief in this Court.

Appellant desires to argue before this Court the propriety of his commitment for contempt for failing to answer questions which are moot.

If, however, it be assumed that the questions were properly before the court, appellant asks leave to call to the attention of this Court the case of *Doram v. United States*, 181 F. 2d 489 (CA 9), in which a witness was upheld in refusing to answer similar questions on the ground of self-incrimination under Sections 371 and 1501 of the Criminal Code.

It must be remembered that prior to appellant's testifying Government counsel had advised the court that a subpoena had been issued for Weisberg and that he would seek a bench warrant. The lower court knew that appellant was aware of this because he had so testified (Appendix, 7a). We desire the oportunity to present argument to this Court that apellant should be distinguished from the [fol. 48] "considerable number of blameless people" referred to in this Court's opinion. In this connection, we invite the Court's attention to the opinion of Taft, J. (later Chief Justice) in *Ex parte Irvine*, 74 Fed. 954, wherein he quoted from Wharton on Criminal Evidence as follows (page 960):

> "The question is for the discretion of the judge and, in exercising this discretion, he must be governed as much *by his personal perception of the peculiarities of the case* as by the facts actually in evidence." (Italics supplied.)

It was argued numerous times in the court below that appellant was not a man of good repute (see, for example, Supplemental Appendix, page 4a) and that court had vigorously charged the grand jury on the nature of its investigation. We think it imperative in the interest of justice that appellant be afforded the opportunity to present argument to this Court that the court below failed utterly to apply "his personal perception of the peculiarities of the case".

III

In the case of *Blau v. United States* decided in the Supreme Court of the United States on December 12, 1950 (19 United States Law Week 4062), the Court unanimously reversed a contempt conviction where the witness had refused to answer questions concerning the Communist Party and her employment by it. The Court said that the provisions of the Smith Act made future prosecution of petitioner far more than "a mere imaginary possibility" and went on to say:

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury [fol. 49] would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempts by courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning."

Appellant desires to reargue his case before this Court in the light of this most recent pronouncement of the Supreme Court. Here, Sections 371 and 1501 of the Criminal Code were "on the statute books" just as was the Smith Act. Likewise, at the time of appellant's testifying it was not only widely publicized that a subpoena had been issued for Weisberg, but also that the Government attorney had asked leave of the court below to issue a bench warrant for him.* The questions asked of appellant, therefore, reasonably could cause him to fear that criminal charges could be brought against him for violation of said sections of the criminal code.

The case of *Estes v. Potter* 180 F. 2d 865, cited in the *Blau* opinion is particularly relevant in this connection and appellant desires to argue before this Court the applicability of that case to the case at bar. The attitude of both lower courts was similar in treating this as a very simple problem

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* Transcript of Proceedings on October 3, 1950 at page 72.

and in assuming that the witness was in the same category as a judge, a preacher or a member of the bar. The court in the *Estes* case said:

> "* * * it would be idle merely to ask the witness if he knew the aliens and, upon his answering yes, then to stop his examination; and the law never requires the doing of an idle thing."

[fol. 50] So, too, in the present case, it would have been idle merely to ask appellant when he had last seen or talked to Weisberg and to stop there. The obvious subsequent questions would lead definitely to answers which might well have incriminated appellant of a violation of the Criminal Code (Sections 371 or 1501).

Appellant believes that the decision of this Court is in conflict with that of the Fifth Circuit in the *Estes* case and prays, therefore, for leave to reargue the matter accordingly.

IV

This case was the first to come before the court below in connection with the investigation by this grand jury. It is possible that appellant and his counsel erred in failing to introduce evidence in support of appellant's claim of privilege. But it is now clear what this evidence is and we submit that appellant should be afforded the opportunity to place it upon the record in the court below.

In any event, we submit that where fundamental constitutional rights are involved, nice technicalities of procedure should not be allowed to prevail to the prejudice of an individual defendant for whose protection these constitutional safeguards were adopted.

Wherefore, appellant earnestly prays that a rehearing be granted.

Respectfully, Gray, Anderson, Schaffer & Rome;
by William A. Gray, Attorneys for Petitioner.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

William A. Gray.

[fol. 51] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ORDER DENYING REHEARING—December 27, 1950

And Now, to wit, on December 27, 1950 after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

Herbert F. Goodrich, Circuit Judge.

[File endorsement omitted.]

[fol. 52] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 513

ORDER ALLOWING CERTIORARI—Filed March 12, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

No. 513 October Term, 1950

SAMUEL HOFFMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LESTER J. SCHAFFER,
WILLIAM A. GRAY,
Counsel for Petitioners.

GRAY, ANDERSON, SCHAFFER & ROME,
Of Counsel,
2100 Girard Trust Company Building,
Philadelphia 2, Pa.

Martin & Lyle, 817 Weightman Bldg., Phila. 2, Pa.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. October Term, 1950

SAMUEL HOFFMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, SAMUEL HOFFMAN, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 8, 1950 and December 27, 1950.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner was found guilty of contempt of court in refusing to answer certain questions propounded to him by a special grand jury sitting in Philadelphia and, on October 5, 1950, was sentenced to a term of five months imprisonment therefor.

An appeal was taken to the Court of Appeals for the Third Circuit which, on December 8, 1950, affirmed the conviction. Thereafter petitioner filed a petition for a rehearing which was denied on December 27, 1950.

The record discloses the following facts:

Petitioner was subpoenaed to appear and testify before the grand jury and, in response to said subpoena, he appeared on September 14, 1950. He was ultimately called as a witness on October 3, 1950 when he testified, inter alia, as follows:

"Q. What do you do now, Mr. Hoffman?

A. I refuse to answer.

Q. Have you been in the same undertaking since the first of the year?

A. I don't understand the question.

Q. Have you been doing the same thing you are doing now since the first of the year?

A. I refuse to answer.

Q. Do you know Mr. William Weisberg?

A. I do.

Q. How long have you known him?

A. Practically twenty years, I guess.

Q. When did you last see him?

A. I refuse to answer.

Q. Have you seen him this week?

A. I refuse to answer.

Q. Do you know that a subpoena has been issued for Mr. Weisberg?

A. I heard about it in Court.

Q. Have you talked with him on the telephone this week?

A. I refuse to answer.

Q. Do you know where Mr. William Weisberg is now?

A. I refuse to answer."

Petitioner persisted in his refusal to answer the aforesaid questions on the ground that he might incriminate himself of a federal offense (R. 7) and he was sentenced as aforesaid.

After commitment, petitioner filed in the District Court a petition for reconsideration of allowance of bail pending appeal, supported by his affidavit setting forth the facts upon which he had based his refusals to answer (R. 7-10). The affidavit had attached thereto as exhibits certain newspaper articles containing the trial court's charge to the grand jury in which he stated that the "investigation will run the gamut of all crimes covered by federal statute" and referring to petitioner as a notorious underworld character with a twenty year police record including a conviction and prison sentence on narcotics charges, an acquittal for murder and innumerable arrests on gambling charges (R. 11). One of the exhibits (R. 14) is a photograph of petitioner sitting with the local head of the United States Bureau of Narcotics. Another article (R. 15) refers to the effort by the special federal prosecutor to obtain a bench warrant for Weisberg. On October 24, 1950 petitioner was released in $10,000 bail.

With respect to the first group of questions—relating to his occupation—petitioner argued in the Court of Appeals that his answers might well amount to a confession of guilt of commission of a federal offense and that with or without the data submitted after commitment, the District Court erred in finding him guilty. The Court of Appeals recognized that the data would have been "adequate to establish circumstantially the likelihood that appellant's assertion of

fear of incrimination was not mere contumacy" (R. 28), but on motion of the government struck this information from the record because it was not before the District Court when it found petitioner guilty (R. 28).

The Court of Appeals divided on the question whether, this information aside, there was enough before the trial court to suggest that the claim of privilege was not groundless (R. 28-29).

With reference to the second group of questions—the whereabouts of the witness Weisberg—petitioner argued in the Court of Appeals that the issue was moot since, prior to both the application for bail and the argument of the appeal, Weisberg had voluntarily appeared as a witness before the grand jury. This position was not contested by the government. Petitioner argued further that his claim of privilege was justified since a subpoena had been issued for Weisberg, but not served, and government counsel had publicly stated in court that he would seek a bench warrant for him. Petitioner's claim, therefore, was based on possible incrimination under Sections 371 and 1501 of the Criminal Code.

The Court of Appeals held, in this connection, that petitioner was no different from any other witness who might have been asked this question—that there was nothing "to differentiate [him] at all or in any significant way from a considerable number of blameless people"—and, therefore, his answer could not "come dangerously close to involving him in a federal offense" (R. 25). Petitioner had, in the lower court, pointed out that he was a notorious criminal and, indeed, the writer of the opinion for the Court of Appeals stated that "the court should have adverted to the fact of common knowledge that there exists a class of persons who live by activity prohibited by federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation" (R. 29).

Petitioner thereafter petitioned for leave to reargue before the Court of Appeals that he should be given the opportunity to present to the court below the facts upon which

he had relied for his claim of privilege and of which he had erroneously believed that court was aware, particularly in view of the serious constitutional question involved. Petitioner also urged the Court of Appeals to grant a rehearing on the basis of the case of *Blau v. United States*, decided in this Court on December 11, 1950 (R. 30-34).

Petitioner now seeks to review the action of the Court of Appeals in affirming the judgment of the District Court and in denying the petition for a rehearing.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked (1) under the Fifth Amendment of the Constitution of the United States which grants defendants in criminal cases the privilege against self-incrimination and (2) under the Act of June 25, 1948, C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (1)).

The judgment to be reviewed, as above stated, is the judgment of the United States Court of Appeals for the Third Circuit, entered on December 8, 1950, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania and the judgment entered on December 27, 1950 denying petitioner's request for a rehearing.

QUESTIONS PRESENTED.

1. Is it a violation of the Fifth Amendment of the Constitution of the United States to adjudge in contempt a witness before a grand jury for failing to answer certain ques-

tions, where the facts and circumstances establish that the witness was in real and genuine fear that his answers might incriminate him or furnish a link in the chain of evidence necessary to establish the commission of a federal offense?

2. Was it error for the Court of Appeals to strike from the record the data relied upon by petitioner in support of his claim of privilege because it was not called to the attention of the lower court until after it had found him in contempt, although the data had been presented to that court prior to the argument of the appeal?

3. Was it error to affirm a conviction for contempt for refusing to answer questions concerning the whereabouts of an individual for whom a subpoena had been issued but not served, where the record shows that shortly after petitioner's commitment the said individual voluntarily had appeared before the grand jury?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. This case raises important constitutional questions, specifically the extent of the protection of the Fifth Amendment to be afforded a witness before a grand jury. The divided decision of the Court of Appeals for the Third Circuit is in conflict with decisions of this Court and the Courts of Appeals of other circuits. See, for example:

Blau v. United States, ——U. S. ——;
Estes v. Potter, 183 F. 2d 865 (C. A. 5);
Doran v. United States, 181 F. 2d 489 (C. A. 9);
Alexander v. United States, 181 F. 2d 480 (C. A. 9);
United States v. Zwillman, 108 F. 2d 802 (C. C. A. 2);

United States v. Weisman, 111 F. 2d 260 (C. C. A. 2);
United States v. Cusson, 132 F. 2d 413 (C. C. A. 2).

2. Petitioner was in a position no different from that of the witness in the case of *Doran v. United States*, supra, where the refusal to answer questions concerning when he had last seen other persons was upheld. The "link in the chain" in the present case was as close, if not closer than that found sufficient in *United States v. Cusson*, supra, *United States v. Zwillman*, supra, *United States v. Weisman*, supra, *Alexander v. United States*, supra, *Estes v. Potter*, supra, and *Blau v. United States*, supra.

3. Neither the lower court nor the Court of Appeals gave any weight to the "setting" under which petitioner had claimed his privilege, but ruled solely on the naked question and the refusal to answer. This conflicts with the established rule in contempt cases and specifically with the rule laid down in *United States v. Cusson*, supra and *State v. Thaden*, 43 Minn. 253, 45 N. W. 447 which held that all the circumstances of the particular case and the nature of the evidence which the witness is called upon to give, must be considered by the trial court.*

4. The Court of Appeals, in granting the government's motion to strike from the record the data submitted by petitioner in support of his motion to be released on bail, in effect held that petitioner had waived his rights under the Fifth Amendment. Since this data was conceded by the Court of Appeals to be sufficient to justify petitioner's claim of privilege, the Court of Appeals should have considered it or at least should have remanded the case to

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* Professor Wigmore (Third Edition, Volume 8, Section 2271, page 406), referring to this opinion, said: "This summing up of Mr. Justice Mitchell leaves nothing to be added, and ought to be the last word in the development of the rule."

give petitioner the opportunity to present it formally to the lower court. To hold petitioner's conduct a waiver of his constitutional rights is in conflict with the decisions of this Court in *Johnson v. Zerbst*, 304 U. S. 458, 82 L. Ed. 1461 and *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LESTER J. SCHAFFER,

WILLIAM A. GRAY,
Counsel for Petitioner.

GRAY, ANDERSON, SCHAFFER & ROME,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals for the Third Circuit (R. 22), filed December 8, 1950, has not yet been officially reported.

STATEMENT OF JURISDICTION, QUESTIONS PRESENTED AND FACTS.

For brevity there will not be repeated here the statement of jurisdiction, the questions presented and the pertinent factual matter, all of which appear in the petition to which this brief is annexed.

ARGUMENT.

I.

The Court of Appeals were unanimous in holding that petitioner could have shown beyond question that there was facing him a real danger of incrimination insofar as the first group of questions was concerned. The evidence introduced in support of his motion for reconsideration of the matter of bail was held to be clearly adequate for this pur-

pose. However, since this data was stricken on motion of the government, the majority of the Court was of the opinion that petitioner had not sustained his burden of showing the trial judge the "incriminatory possibilities of the question" (R. 27).

The writer of the Court's opinion differed from the majority in this connection. He stated that even without the data subsequently furnished, the trial court should have adverted to the facts at his disposal—the nature of the investigation and the class of persons being summoned as witnesses—to establish the likelihood of good faith in the claim of privilege (R. 28-29).

We think it obvious that no trial judge should sit *in vacuo* in matters of this sort, particularly where it is clear that the judge, having charged the grand jury, was intimately familiar with the entire atmosphere of the investigation. As was stated by Taft, J. (later Chief Justice) in *Ex parte Irvine*, 74 Fed. 954, wherein he quoted from Wharton on Criminal Evidence as follows (page 960):

> "The question is for the discretion of the judge and, in exercising this discretion, he must be governed *as much by his personal perception of the peculiarities of the case* as by the facts actually in evidence" (Emphasis supplied).

It is clear that the trial judge did not take into consideration any factors other than the naked question and the refusal to answer. The minority of the Court of Appeals believed that he should have considered all of the circumstances, as did petitioner. If the petitioner were in error in assuming that the trial judge knew of his background and the nature of the grand jury investigation he attempted to correct this error by presenting the facts to the trial court in the bail matter, before the appeal was heard.

The Court of Appeals, in granting the government's motion to strike this data, held, in effect, that petitioner had waived his rights by failing to introduce this evidence prior

to his commitment. Yet it is clear that if petitioner or his counsel erred in assuming that the lower court was fully aware of all of the facts later furnished, it was the type of error which, in the interest of justice, petitioner should be permitted to correct.* Thus, since the trial court was furnished with the data prior to the argument of the appeal and since that data admittedly would have made petitioner's claim of privilege well-founded, we submit that at the very least petitioner should have been afforded the opportunity to present the facts anew to the trial court.

This court has always been loath to find that constitutional rights have been waived. As was stated by Mr. Justice Black in *Johnson v. Zerbst*, 304 U. S. 458, 464, 82 L. Ed. 1461, 1468 (1938):

> "It has been pointed out that 'courts indulge every reasonable presumption against' waiver of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'."

See also *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, 751-752.

We submit that the Court of Appeals has forfeited petitioner's constitutional rights on the basis of unrealistic procedural technicalities. We know of no case in which so fundamental a right as the privilege against self-incrimination has been so lightly cast aside.

II.

With reference to the second group of questions—relating to the whereabouts of Weisberg—the Court of Appeals recognized that there was likelihood of dispute over the application of the Marshall rule as laid down in the *Burr Case* (R. 25). The Court made no reference to petition-

* Particularly since the writer of the opinion below agreed with petitioner's analysis of the situation.

er's argument that the question was really moot in view of Weisberg's voluntary appearance as a witness both prior to the motion for allowance of bail and the argument on appeal. All parties assumed that this group of questions was out of the case; indeed, in the government brief on appeal, no argument whatsoever was made on this phase of the case.

Assuming arguendo that the Weisberg questions were properly before the Court, we submit that petitioner's claim of privilege should have been sustained.

Here, petitioner, a notorious underworld figure, was being examined in a grand jury investigation recognized by the trial judge as running "the gamut of all crimes covered by federal statute" (R. 11). Likewise, Max H. Goldschein, the special deputy attorney general in charge had stated publicly that the government was "having trouble finding some big shots" (R. 11) and approximately one week prior to petitioner's appearance before the grand jury had sought from this same trial judge a bench warrant for Weisberg because he had been unable to serve the subpoena on him (R. 11).

In this setting (and we believe the "setting" in these matters is all-important*), petitioner was asked when he had last seen Weisberg, whether he had talked to him during the week and whether he knew where he was (R. 3).

The Court of Appeals treated petitioner as if he were any law-abiding citizen who had been asked the same question and held that the danger of incrimination was not sufficiently close to permit petitioner to exercise his privilege (R. 25).

This ruling directly conflicts with that of the Court of Appeals for the Ninth Circuit in *Doran v. United States*, 181 F. 2d 489 (C. A. 9). There the witness was asked the question "Have you see X recently?". The Court said (page 491):

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* Cf., State v. Thaden, supra, United States v. Cusson, supra, Ex parte Irvine, supra and United States v. Weisman, infra.

"It appears that the United States Attorney [Goldschein] has caused subpoenas and bench warrants to be issued for them. The applications charged not only [the sought after witnesses] with deliberate avoidance of service of subpoena, but also that 'various witnesses' for whom subpoenas had issued 'have been following a *common course of conduct* in avoiding service and impeding *the functioning of said grand jury*' (Emphasis supplied). This plainly applied to [the missing witnesses] and with equal plainness charged a conspiracy to obstruct the administration of justice in violation of 18 U. S. C. A. §§1501 and 371. * * *"

It is no answer to say that petitioner might well have answered these questions "yes" or "no" because it must be obvious that Mr. Goldschein would not have stopped there but would have proceeded with questions leading ultimately to a conspiracy to obstruct justice. As was said in *Estes v. Potter*, 183 F. 2d 865, 867 (C. A. 5):

"* * * it would be idle merely to ask the witness if he knew the aliens and, upon his answering yes, then to stop his examination: and the law never requires the doing of an idle thing."

Petitioner's refusal to answer these questions was based on his fear that by so doing he would furnish a "link in the chain" for a future prosecution for conspiracy to obstruct justice. It seems strange that the language of this Court in such cases as *United States v. Burr*, 25 Fed. Cas. No. 14, 694, 38 and *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110 has been so distorted and emasculated over the years as to cause the conflict in Circuits as we find here. But all of these conflicts, we submit, have been resolved in the recent opinion of this Court in *Blau v. United States*, —— U. S. ——* where the true meaning of the *Burr* case was clearly and forcibly reiterated.

* Decided December 11, 1950. (See also Irving Blau v. United States, —— U. S. ——, decided January 15, 1951.)

The Courts of Appeals of the Second and Ninth Circuits, among others, have had no difficulty in construing the Fifth Amendment "as it has been interpreted from the beginning". In *United States v. Weisman*, 111 F. 2d 260 (C. C. A. 2), the questions were, first, whether the witness had ever received any cables at a certain restaurant in New York and, second, whether he knew anyone who had visited, lived in, or stayed at Shanghai in the years 1934 to 1939. The Court, speaking through Judge Learned Hand, held:

> "The two questions were on their face innocent, and it lay upon the defendant to show that answers to them might incriminate him. * * * Whether he had the burden of proof upon that issue we need not decide, for we think in any case he proved his excuse. Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available. * * *
>
> "Further, the defendant was plainly justified in supposing that he was the object of pursuit by the district attorney; and while the irresponsible gossip of a newspaper is a weak reed, there is always the possibility that it may for once be right. It directly pointed to the defendant, and it would certainly have disturbed any but the most hardy. * * *
>
> "But we are to take the question in its setting * * * and the information of which we may reasonably infer the prosecution had possession. * * * Again we are to remember that the defendant had been the object of much more than casual interest by the prosecution. These things made it perilous for him to answer. * * *"

In *United States v. Zwillman*, 108 F. 2d 802 (C. C. A. 2), the questions propounded to the witness were "who were your business associates" in certain prior years. The Second Circuit (Augustus N. Hand, Circuit Judge) there held:

> "The defendant claims, and we think with fair reason, that the answers sought would be a link in the chain of incriminating testimony and that he ought not to be compelled to give them—at least if he could show that he was likely to be endangered by answering."

The case of *Alexander v. United States*, 181 F. 2d, 480 (C. A. 9) is to the same effect. There the question was whether the witness knew the names of the county officers of the Los Angeles Communist party. The Court there recognized that newspaper articles concerned with the inquiry were "competent to show the information available to appellants and the reasonableness of their fear of prosecution" and went on to say (page 485):

> "In that case [Arndstein v. McCarthy, 254 U. S. 71, 65 L. Ed. 138] Arndstein was held not in contempt because, as stated by the court: '*It is impossible to say* from mere consideration of the question propounded, in the light of the circumstances disclosed, *that they could have been answered with entire impunity*. The writ should have issued' (Emphasis supplied). * * * Here it is clearly *possible* to say that the answers would tend to impugn Alexander and the others of the group."

In *United States v. Cusson*, 132 F. 2d 413 (C. C. A. 2) the witness was asked and refused to answer the question whether she had met "any of the Groveses" upon a visit to Philadelphia in 1941. The Court (Learned Hand, Circuit Judge) there held:

> "This question was harmless enough on its face and an answer to it could become incriminating only by reason of some setting which made it a possible step in

> the disclosure of a crime. The issue on this appeal is whether the record contains enough evidence of such a setting. We think that it does. * * * Her excuse for refusing to say whether she met and talked to "the Groveses" was that it might serve as a link in establishing that they had told her to go to Mexico so as to avoid being called as a witness upon their trial and that this would tend to prove that she had conspired with them to obstruct justice."

Both the trial court and Mr. Goldschein were aware of all the facts concerning Weisberg. It would have been useless, we submit, for petitioner to have called them to the court's attention.

Obstruction of justice is a federal offense, as is conspiracy to obstruct justice. It must be obvious that if petitioner had been compelled to answer, he might very well have incriminated himself of the crime of conspiracy to obstruct justice by furnishing a link in the chain of evidence. If these questions had been answered, the next questions would have been what the conversations were. There is a serious question whether, having answered the prior questions, the witness could have claimed his privilege as to the subsequent ones: Cf. *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819.

We submit that petitioner was in genuine fear when he refused to answer and that his fear was a substantial one. This is not a game between a witness and the government but rather a vital question of the enforcement of constitutional rights on behalf of citizens. This Court has always given full effect to the limitation on governmental powers prescribed by the Fifth Amendment and we urge it to do so here.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the adverse decision.

LESTER J. SCHAFFER,
WILLIAM A. GRAY,
Counsel for Petitioner.

GRAY, ANDERSON, SCHAFFER & ROME,
Of Counsel.

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No. 513.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1950.

SAMUEL HOFFMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals for the Third Circuit (R. 22) filed December 8, 1950, is reported at 185 F. 2d 617.

JURISDICTION.

The jurisdiction of this Court is invoked (1) under the Fifth Amendment of the Constitution of the United States which grants defendants in criminal cases the privilege against self-incrimination and (2) under the Act of June 25, 1948, C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (1)).

The judgment to be reviewed, as above stated, is the judgment of the United States Court of Appeals for the Third Circuit, entered on December 8, 1950, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania and the judgment entered on December 27, 1950 denying petitioner's request for a rehearing.

QUESTIONS PRESENTED.

1. Is it a violation of the Fifth Amendment of the Constitution of the United States to adjudge in contempt a witness before a federal grand jury for failing to answer certain questions, where the facts and circumstances establish that the witness was in real and genuine fear that his answers might incriminate him or furnish a link in the chain of evidence necessary to establish the commission of a federal offense?

2. Was it error for the Court of Appeals to strike from the record the data relied upon by petitioner in support of his claim of privilege because it was not called to the attention of the lower court until after it had found him in

contempt, although the data had been presented to that court prior to the argument of the appeal?

3. Was it error to affirm a conviction for contempt for refusing to answer questions concerning the whereabouts of an individual for whom a subpoena had been issued but not served, where the record shows that shortly after petitioner's commitment the said individual voluntarily had appeared before the grand jury?

STATEMENT.

The petitioner was found guilty of contempt of court in refusing to answer certain questions propounded to him by a special federal grand jury sitting in Philadelphia and, on October 5, 1950, was sentenced to a term of five months imprisonment therefor.

An appeal was taken to the Court of Appeals for the Third Circuit which, on December 8, 1950, affirmed the conviction. Thereafter petitioner filed a petition for a rehearing which was denied on December 27, 1950.

Thereafter petitioner filed in this Court a petition for a writ of certiorari which was granted on March 12, 1951.

The record discloses the following facts:

Petitioner was subpoenaed to appear and testify before the grand jury and, in response to said subpoena, he appeared on September 14, 1950. He was ultimately called as a witness on October 3, 1950 when he testified, inter alia, as follows:

"Q. What do you do now, Mr. Hoffman?

A. I refuse to answer.

Q. Have you been in the same undertaking since the first of the year?

A. I don't understand the question.

Q. Have you been doing the same thing you are doing now since the first of the year?

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Q. Do you know Mr. William Weisberg?

A. I do.

Q. How long have you known him?

A. Practically twenty years, I guess.

Q. When did you last see him?

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acter with a twenty year police record including a conviction and prison sentence on narcotics charges, an acquittal for murder and innumerable arrests on gambling charges (R. 11). One of the exhibits (R. 14) is a photograph of petitioner sitting with the local head of the United States Bureau of Narcotics. Another article (R. 15) refers to the effort by the special federal prosecutor to obtain a bench warrant for Weisberg. On October 24, 1950 petitioner was released in $10,000 bail.

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With reference to the second group of questions—the whereabouts of the witness Weisberg—petitioner argued in the Court of Appeals that the issue was moot since, prior to both the application for bail and the argument of the appeal, Weisberg had voluntarily appeared as a witness before the grand jury. This position was not contested by the government. Petitioner argued further that his claim of privilege was justified since a subpoena had been issued for Weisberg, but not served, and government counsel had publicly stated in court that he would seek a bench warrant for him. Petitioner's claim, therefore, was based on possible

incrimination under Sections 371 and 1501 of the Criminal Code having to do with the obstruction of justice.

The Court of Appeals held, in this connection, that petitioner was no different from any other witness who might have been asked this question—that there was nothing "to differentiate [him] at all or in any significant way from a considerable number of blameless people"—and, therefore, his answer could not "come dangerously close to involving him in a federal offense" (R. 25). Petitioner had, in the lower court, pointed out that he was a notorious criminal and, indeed, the writer of the opinion for the Court of Appeals stated that "the court should have adverted to the fact of common knowledge that there exists a class of persons who live by activity prohibited by federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation" (R. 29).

Petitioner thereafter petitioned for leave to reargue before the Court of Appeals that he should be given the opportunity, particularly in view of the serious constitutional question involved, to present to the court below the facts upon which he had relied for his claim of privilege and of which he had erroneously believed that court was aware. Petitioner also urged the Court of Appeals to grant a rehearing on the basis of the case of *Blau v. United States*, decided in this Court on December 11, 1950 (R. 30-34).

Petitioner now seeks to review the action of the Court of Appeals in affirming the judgment of the District Court and in denying the petition for a rehearing.

ARGUMENT.

I.

The Court of Appeals was unanimous in holding that petitioner could have shown beyond question that there was facing him a real danger of incrimination insofar as the first group of questions—those relating to his occupation—was concerned. The evidence introduced in support of his motion for reconsideration of the matter of bail was held to be clearly adequate for this purpose.

However, since those data were stricken on motion of the government, the majority of the Court was of the opinion that petitioner had not sustained his burden of showing the trial judge the "incriminatory possibilities of the question" (R. 27).

The writer of the Court's opinion differed from the majority in this connection. He stated that even without the data subsequently furnished, the trial court should have adverted to the facts at his disposal—the nature of the investigation and the class of persons being summoned as witnesses—to establish the likelihood of good faith in the claim of privilege (R. 28-29).

We contend that no trial judge should sit *in vacuo* in matters of this sort, particularly where it is clear that the judge, having charged the grand jury, was intimately familiar with the entire atmosphere of the investigation. As was stated by Taft, J. (later Chief Justice) in *Ex parte Irvine*, 74 Fed. 954, wherein he quoted from Wharton on Criminal Evidence as follows (page 960):

> "The question is for the discretion of the judge and, in exercising this discretion, he must be governed *as much by his personal perception of the peculiarities of*

the case as by the facts actually in evidence" (Emphasis supplied).

This is not simply a case of an "ordinary witness" being interrogated by the grand jury. It is rather the case of a *potential* defendant—one of a class publicly stated by the United States Attorney to be the primary object of his inquiry into the violation of the "gamut of federal offenses." An *ordinary* defendant is never summoned before the usual grand jury for interrogation. We submit that it is "abhorrent to the instincts of an American" to permit a United States Attorney to use the machinery of a special grand jury to obtain incriminatory evidence from one known to be the object of the Government's pursuit.

It is clear that the trial judge did not take into consideration any factors other than the naked question and the refusal to answer. The minority of the Court of Appeals believed that he should have considered all of the circumstances, as did petitioner. If the petitioner were in error in assuming that the trial judge knew of his background and the nature of the grand jury investigation he attempted to correct this error by presenting the facts to the trial court in the bail matter, before the appeal was heard.

The Court of Appeals, in granting the government's motion to strike these data, held, in effect, that petitioner had waived his rights by failing to introduce this evidence prior to his commitment. Yet it is clear that if petitioner or his counsel erred in assuming that the lower court was fully aware of all of the facts later furnished, it was the type of error which, in the interest of justice, petitioner should be permitted to correct.* Thus, since the trial court was furnished with the data prior to the argument of the appeal and since the data admittedly would have made petitioner's claim of privilege well-founded, we submit that at the very

* Particularly since the writer of the opinion below agreed with petitioner's analysis of the situation.

least petitioner should have been afforded the opportunity to present the facts anew to the trial court.

This Court very recently (February 26, 1951) had before it the case of *Jane Rogers v. United States* (95 L. ed. Advance Reports 374) involving the waiver of the right to claim constitutional privilege. The dissenting justices there stated: "The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it." In the case at bar, neither petitioner nor his counsel had *that* difficulty,** but rather erred, according to the majority of the Court of Appeals, in failing to introduce evidence, admittedly available, to support his claim. If petitioner and his counsel did so err, it is apparent that their error resulted from their belief that all of the facts were known to both the trial judge and the prosecutor and it would have been futile to present formal proof thereof on the theory that "the law never requires the doing of an idle thing": *Estes v. Potter*, 183 F. 2d 865 (C. A. 5).

In any event, this Court has always been loath to find that constitutional rights have been waived. As was stated by Mr. Justice Black in *Johnson v. Zerbst*, 304 U. S. 458, 464, 82 L. ed. 1461, 1468:

> "It has been pointed out that 'courts indulge every reasonable presumption against' waiver of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"

See also *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 751-752.

We submit that the Court of Appeals has forfeited petitioner's constitutional rights on the basis of unrealistic procedural technicalities. We know of no case in which so

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** Petitioner's refusals to answer were noted on the record as based upon the ground that he might incriminate himself of a federal offense (R. 7).

fundamental a right as the privilege against self-incrimination has been so lightly cast aside: Cf. *Jane Rogers v. United States*, supra.

II.

With reference to the second group of questions—relating to the whereabouts of Weisberg—the Court of Appeals recognized that there was likelihood of dispute over the application of the Marshall rule as laid down in the *Burr Case* (R. 25). The Court made no reference to petitioner's argument that the question was really moot in view of Weisberg's voluntary appearance as a witness both prior to the motion for allowance of bail and the argument on appeal. All parties assumed that this group of questions was out of the case; indeed, in the Government brief on appeal, no argument whatsoever was made on this phase of the case.

In the Government's Brief in Opposition, it was stated that this argument is specious on the theory that the contempt was complete upon petitioner's refusal to answer (Brief, pages 20-21, footnote). We do not believe that any witness should be punished by imprisonment for failing to answer questions admittedly no longer important to the Government's inquiry. However, petitioner's principal point here is that the Government itself had abandoned the matter entirely and had rested its desire for petitioner's imprisonment solely upon his refusal to answer those questions relating to his occupation. The Government has yet to deny this abandonment.

Petitioner does not base his argument solely upon this technicality and will assume, arguendo, that the Weisberg questions were properly before the Court. We contend that petitioner's claim of privilege should have been sustained under all the authorities.

At the outset, we must register astonishment at the

Government position as expressed in its Brief in Opposition. It was there said (Brief, page 20):

> "Even taking account of the fact that Weisberg, being desired as a witness, had been subpoenaed but could not be found, there has been no showing (or even suggestion) in the record that petitioner conspired with Weisberg to evade service of the subpoena. A more reasonable explanation of petitioner's desire not to reveal Weisberg's whereabouts, or when he had last seen him, is that he wished to shield Weisberg from interrogation by the Government."

Certainly it cannot be seriously contended that petitioner, to be protected, must answer: "Since I in fact had conspired with Weisberg to evade the subpoena and thus obstruct justice, I refuse to answer." This would compel him to go far beyond what Judge Learned Hand referred to as "the door's being set a little ajar": *United States v. Weisman*, 111 F. 2d 260 (C. C. A. 2).

Likewise, we are not in the realm of what is or is not *reasonable* under the circumstances. It may well be that petitioner did want to protect Weisberg from the treatment to which he (Hoffman) was being subjected (as occurred in the *Jane Rogers* case), but he did not so state. He did say that the answers would tend to incriminate him and, we submit, since the *Burr* case, as lately confirmed by this Court, "he must be the sole judge what his answer would be." It is not even for the Court, let alone the prosecutor, to "participate with him in this judgment"; therefore whether the Government believes it had a "more reasonable explanation" for petitioner's conduct is wholly immaterial.

Here, petitioner, a notorious underworld figure, was being examined in a grand jury investigation recognized by the trial judge as running "the gamut of all crimes covered by federal statute" (R. 11). Likewise, Max H. Goldschein,

the special deputy attorney general in charge, had stated publicly that the Government was "having trouble finding some big shots" (R. 11), and approximately one week prior to petitioner's appearance before the grand jury had sought from this same trial judge a bench warrant for Weisberg because he had been unable to serve the subpoena on him (R. 15).

In this setting (and we believe the "setting" in these matters is all-important*), petitioner was asked when he had last seen Weisberg, whether he had talked to him during the week and whether he knew where he was (R. 3).

The Court of Appeals treated petitioner as if he were any law-abiding citizen who had been asked the same question and held that the danger of incrimination was not sufficiently close to permit petitioner to exercise his privilege (R. 25).

This ruling directly conflicts with that of the Court of Appeals for the Ninth Circuit in *Doran v. United States*, 181 F. 2d 489 (C. A. 9). There the witness was asked the question "Have you seen X recently?". The Court said (page 491):

> "It appears that the United States Attorney [Goldschein] has caused subpoenas and bench warrants to be issued for them. The applications charged not only [the sought after witnesses] with deliberate avoidance of service of subpoena, but also that 'various witnesses' for whom subpoenas had issued 'have been following a *common course of conduct* in avoiding service and impeding *the functioning of said grand jury*' (Emphasis supplied). This plainly applied to [the missing witnesses] and with equal plainness charged a conspiracy to obstruct the administration of justice in violation of 18 U. S. C. A. §§1501 and 371.* * *"

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* Cf., State v. Thaden, 43 Minn. 253, 45 N. W. 447, United States v. Cusson, 132 F. 2d 413 (CCA 2), Ex parte Irvine, 74 Fed. 954 and United States v. Weisman, supra.

It is no answer to say that petitioner might well have answered these questions "yes" or "no" because it must be obvious that Mr. Goldschein would not have stopped there but would have proceeded with questions leading ultimately to a conspiracy to obstruct justice. As was said in *Estes v. Potter*, 183 F. 2d 865, 867 (C. A. 5):

> "* * * it would be idle merely to ask the witness if he knew the aliens and, upon his answering yes, then to stop his examination; and the law never requires the doing of an idle thing."

Likewise, if petitioner had answered the questions asked, we contend that there would be a serious question whether he could properly thereafter refuse to answer the obvious follow-up questions, such as, "When you last talked to Weisberg, what was your conversation?" *Jane Rogers v. United States* U. S. (95 L. ed. Advance Reports 374). As was stated in the dissenting opinion:

> "Moreover, today's holding creates this dilemma for the witness: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question."

Petitioner's refusal to answer these questions was based on his fear that by so doing he would furnish a "link in the chain" for a future prosecution for conspiracy to obstruct justice. It seems strange that the language of this Court in such cases as *United States v. Burr*, 25 Fed. Cas. No. 14, 694, 38 and *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, has been so distorted and emasculated over the years as to cause the conflict in the decisions which we find here. But all of these conflicts, we submit, have been resolved in the recent opinion of this Court in *Blau v. United States*, 340

U. S. 159* where the true meaning of the *Burr* case was clearly and forcibly reiterated.

The Courts of Appeals for the Second and Ninth Circuits, among others, have had no difficulty in construing the Fifth Amendment "as it has been interpreted from the beginning". In *United States v. Weisman*, 111 F. 2d 260 (C. A. 2), the questions were, first, whether the witness had ever received any cables at a certain restaurant in New York and, second, whether he knew anyone who had visited, lived in, or stayed at Shanghai in the years 1934 to 1939. The Court, speaking through Judge Learned Hand, held:

> "The two questions were on their face innocent, and it lay upon the defendant to show that answers to them might incriminate him. * * * Whether he had the burden of proof upon that issue we need not decide, for we think in any case he proved his excuse. Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available. * * *
>
> "Further, the defendant was plainly justified in supposing that he was the object of pursuit by the district attorney; and while the irresponsible gossip of a newspaper is a weak reed, there is always the possibility that it may for once be right. It directly pointed to the defendant, and it would certainly have disturbed any but the most hardy. * * *

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* See also Irving Blau v. United States, —— U. S. ——, 95 L. ed. Advance Reports 234.

> "But we are to take the question in its setting * * * and the information of which we may reasonably infer the prosecution had possession. * * * Again we are to remember that the defendant had been the object of much more than casual interest by the prosecution. These things made it perilous for him to answer. * * *"

In *United States v. Zwillman*, 108 F. 2d 802 (C. A. 2), the questions propounded to the witness were "who were your business associates" in certain prior years. The Second Circuit (Augustus N. Hand, Circuit Judge) there held:

> "The defendant claims, and we think with fair reason, that the answers sought would be a link in the chain of incriminating testimony and that he ought not to be compelled to give them—at least if he could show that he was likely to be endangered by answering."

The case of *Alexander v. United States*, 181 F. 2d, 480 (C. A. 9) is to the same effect. There the question was whether the witness knew the names of the county officers of the Los Angeles Communist party. The Court there recognized that newspaper articles concerned with the inquiry were "competent to show the information available to appellants and the reasonableness of their fear of prosecution" and went on to say (page 485):

> "In that case [Arndstein v. McCarthy, 254 U. S. 71, 65 L. Ed. 138] Arndstein was held not in contempt because, as stated by the court: '*It is impossible to say* from mere consideration of the question propounded, in the light of the circumstances disclosed, *that they could have been answered with entire impunity.* The writ should have issued' (Emphasis supplied). * * * Here it is clearly *possible* to say that the answers would tend to impugn Alexander and the others of the group."

In *United States v. Cusson*, 132 F. 2d 413 (C. A. 2) the witness was asked and refused to answer the question whether she had met "any of the Groveses" upon a visit to Philadelphia in 1941. The Court (Learned Hand, Circuit Judge) there held:

> "This question was harmless enough on its face and an answer to it could become incriminating only by reason of some setting which made it a possible step in the disclosure of a crime. The issue on this appeal is whether the record contains enough evidence of such a setting. We think that it does. * * * Her excuse for refusing to say whether she met and talked to "the Groveses" was that it might serve as a link in establishing that they had told her to go to Mexico so as to avoid being called as a witness upon their trial and that this would tend to prove that she had conspired with them to obstruct justice."

The facts concerning Weisberg were well known to both the lower court and to Mr. Goldschein. The latter had publicly complained from the date of the swearing of the grand jury that "we are having trouble finding some big shots" (R. 11). He had appeared in open court, several days prior to petitioner's testimony before the grand jury, seeking a bench warrant for Weisberg (R. 15). Petitioner, in response to Mr. Goldschein's question, replied that he knew that there was a subpoena out for Weisberg because he "heard about it in court" (R. 3).

We submit that petitioner should not be held accountable for failing to prove formally that which was well known to the court and to the prosecutor.

Obstruction of justice is a federal offense, as is conspiracy to obstruct justice. It must be obvious that if petitioner had been compelled to answer, he might very well have incriminated himself of the crime of conspiracy to obstruct justice by furnishing a link in the chain of evidence. If

these questions had been answered, the next questions would have been what the conversations were. As aforesaid, there is a serious question whether, having answered the prior questions, the witness could have claimed his privilege as to the subsequent ones: Cf. *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819, *Jane Rogers v. United States*, supra.

We submit that petitioner was in genuine fear when he refused to answer and that his fear was a substantial one. This is not a game between a witness and the Government but rather a vital question of the enforcement of constitutional rights on behalf of citizens. This Court has always given full effect to the limitation on governmental powers prescribed by the Fifth Amendment and we urge it to do so here.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

LESTER J. SCHAFFER,
WILLIAM A. GRAY,
Counsel for Petitioner.

GRAY, ANDERSON, SCHAFFER & ROME,
Of Counsel.

No. 513

In the Supreme Court of the United States

OCTOBER TERM, 1950

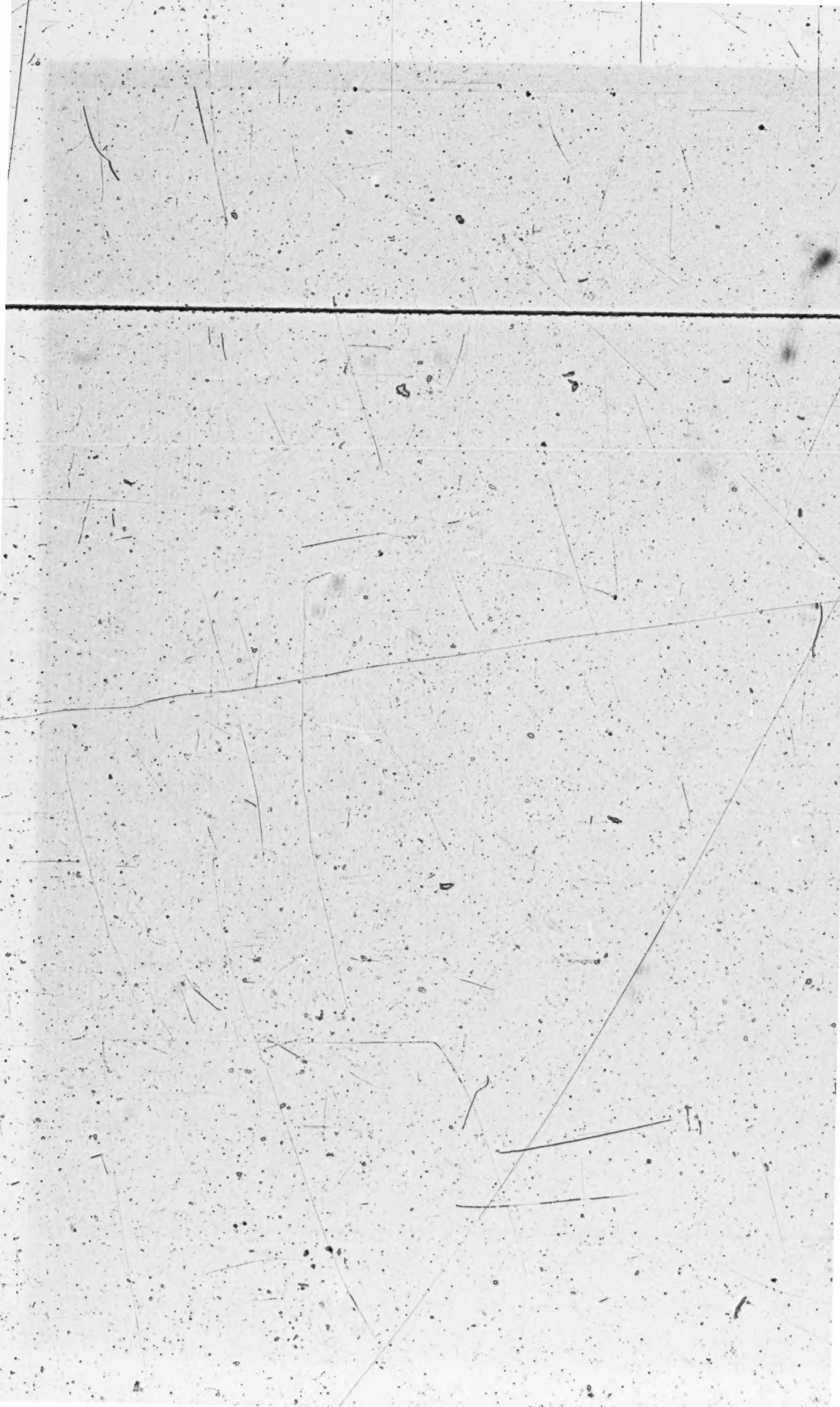
[redacted]

v.

[redacted]

PETITION FOR A WRIT OF CERTIORARI TO THE [redacted]

BRIEF FOR THE UNITED STATES IN OPPOSITION



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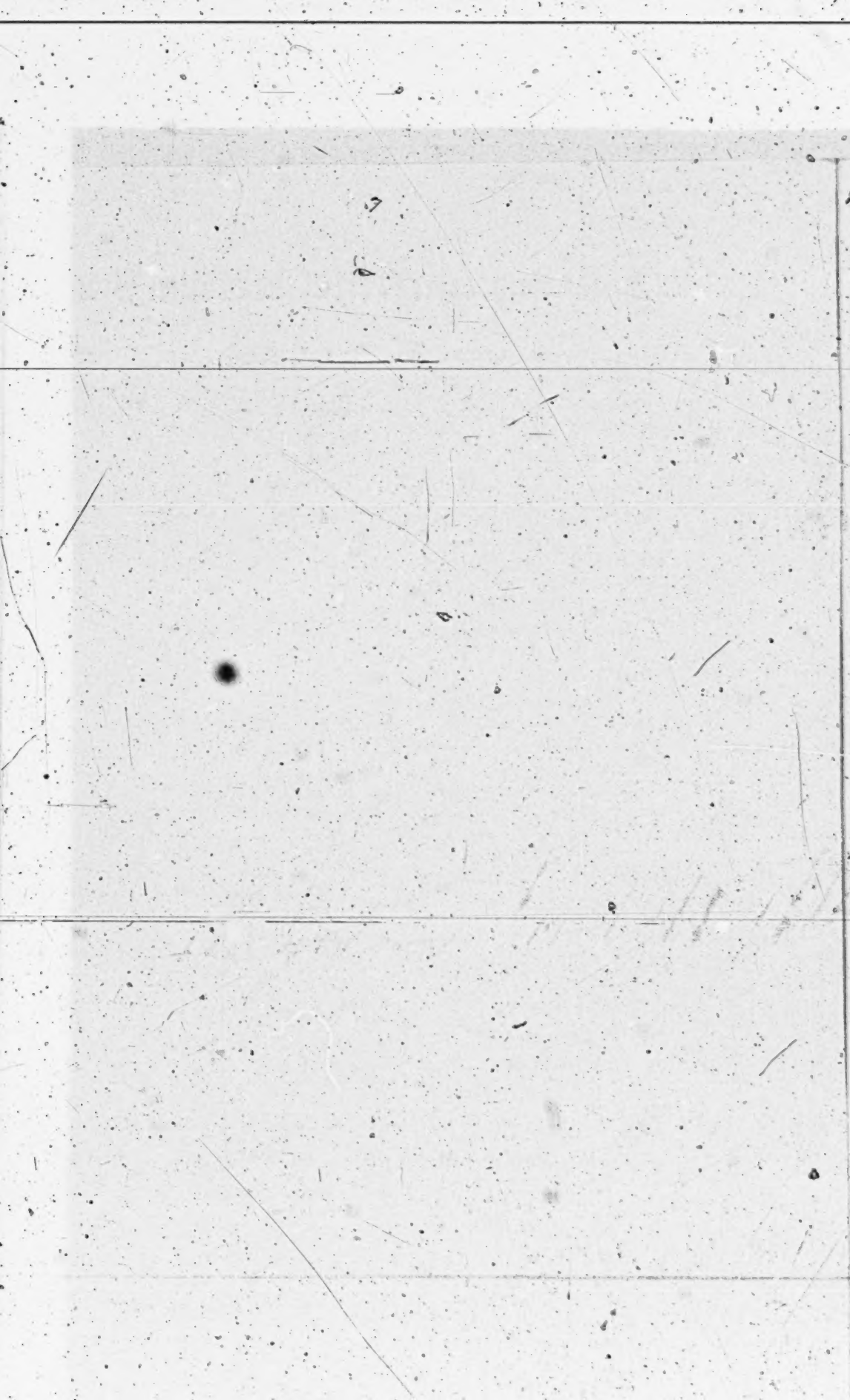

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 513

SAMUEL HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 22-29) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1950 (R. 30), and a petition for rehearing (R. 30-34) was denied on December 27, 1950 (R. 35). The petition for a writ of

certiorari was filed on January 25, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether petitioner, a witness before a grand jury investigating violations of federal statutes, could lawfully refuse, on the asserted ground that his answers would tend to incriminate him, to answer questions relating to his occupation, the whereabouts of a subpoenaed acquaintance desired by the Government as a witness, and when he had last seen the latter, without any showing, other than the nature of the questions themselves, that his answers would in fact tend to incriminate him.

STATEMENT

On September 14, 1950, a grand jury of the Eastern District of Pennsylvania undertook an investigation "concerning frauds upon and conspiracies to defraud the Government of the United States, involving violations of the Customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses" (R. 2). On October 3, 1950, petitioner, appearing as a witness before this grand jury, refused to answer certain questions on the asserted ground that his answers might tend to incriminate him (R. 2, 5). The questions which he refused to answer appear from the following

excerpt from the transcript of the grand jury proceedings (R. 3, 5-6, italics supplied):

Q. *What do you do now, Mr. Hoffman?*
A. I refuse to answer.

* * * * *

Q. *Have you been doing the same thing you are doing now since the first of the year?*
A. I refuse to answer.
Q. Do you know Mr. William Weisberg?
A. I do.
Q. How long have you known him?
A. Practically twenty years, I guess.
Q. *When did you last see him?*
A. I refuse to answer.
Q. *Have you seen him this week?*
A. I refuse to answer.
Q. Do you know that a subpoena has been issued for Mr. Weisberg?
A. I heard about it in Court.
Q. *Have you talked with him on the telephone this week?*
A. I refuse to answer.
Q. *Do you know where Mr. William Weisberg is now?*
A. I refuse to answer.

Later on the same day, October 3, petitioner and his counsel appeared in open court before the District Court (Ganey, D. J.), and the Government challenged petitioner's claim of privilege (R. 2, 5). The court, after hearing the questions propounded and the answers made thereto, *supra,* and after

hearing argument by petitioner's counsel,[1] found that "there was no real and substantial danger of incrimination to [petitioner] for a Federal offense" and ordered him to reappear before the grand jury and answer the questions which he had declined to answer (R. 5, 2-3).

On the following day, October 4, 1950, petitioner and his counsel again appeared in open court before Judge Ganey. It appears that the judge at that time permitted counsel to renew his argument of the preceding day in support of his claim that petitioner's refusal to answer the questions above referred to was based on a proper claim of privilege. The gist of the argument appears from the following excerpt from the transcript (R. 17-19):

> Mr. Gray [counsel for petitioner]: * * * while Your Honor was, and you always are, sir, extremely patient in listening to the presentation I made yesterday in the matter, I would like to emphasize one fact that I put yesterday to Your Honor, and that is when this man was asked what was his business, I argued to Your Honor that he would have the right to refuse to answer on the ground that it might incriminate him of a Federal offense. I now put the hypothetical question to Your Honor, suppose this man was engaged in counterfeiting?
>
> If he answers the question, he answers it truthfully, and if he does not answer it truth-

[1] The argument made by counsel on October 3 is not contained in the printed record. See pp. 4-7, *infra*, for pertinent extracts from counsel's argument of the following day.

fully, he will be subjected to the penalties of perjury. If he answers it truthfully, he certainly is incriminating himself of having been guilty of an offense under the United States Law.

The Court: What do you say to that, Mr. Goldschein?

* * * * *

Mr. Goldschein [counsel for the Government]: I think, may it please the Court, that before a witness can be given privilege against self-incrimination that the obvious answer to the question must be such that the Court can determine from the question, if the question is answered in the affirmative, that it would incriminate him. Other than that, the witness must give the Court sufficient so that the Court can determine.

The Court: Yes, I think that is right. I ask, what is your job——

Mr. Gray: May I say, before that——

The Court: Excuse me, Mr. Gray. That may be laid in an environment and under such circumstances from which the only inference that can be drawn—I cannot say that he is a counterfeiter—I think I have the right to presume he is engaged in a lawful occupation.

Mr. Gray: My friend does not answer the question and Your Honor does not answer it. Suppose the man is in the counterfeiting business. He is asked the question, What is your business?

He knows he is a counterfeiter; it is his only business; he cannot answer the question be-

cause it would incriminate him. What can he say? He cannot say, "I refuse to answer the question because I am in the counterfeiting business, or I refuse to answer the question because it might incriminate me under the Federal laws; he happens to be a counterfeiter. What are you going to do about that?

The Court: I know, but the whole background—I think it must be laid in a background from which the Court can glean that he is in the counterfeiting business. The mere asking of the question, "What business are you in?"——

Mr. Gray: Well, he is in the counterfeiting business.

The Court:—does not warrant the assumption that he is in the counterfeiting business. He may be in the counterfeiting business. I have to go one step further, don't I, and make the assumption, don't I, that he is in the counterfeiting business or may be——

Mr. Gray: No, not at all. He is actually in the counterfeiting business. He is actually in the business.

The Court: I don't know that.

Mr. Gray: You don't know that, but he knows it in his own mind. How is he going to do more than say, "I refuse to answer on the ground that it may incriminate me"? He cannot explain that he is in the counterfeiting business, and that is why it would incriminate him, because he is then incriminating himself.

The Court: All right, let us take myself. Suppose I were summoned before the Grand

Jury; they say, "What is your business?" I say, I refuse to answer on the ground of self-incrimination.

Mr. Gray: Your illustration——

The Court: I don't know. I don't know what Hoffman does.

Mr. Gray: Your illustration is not very good. It has been broadly published that this man has a police record——

The Court: I don't know it.

Mr. Gray:—that he is not a character that belongs on the bench, or a character that belongs at the bar.

The Court: That I really don't know.

Mr. Gray: Wait; that is no answer to the fact that he may be in the counterfeiting business, and being in the counterfeiting business, if he makes any other explanation than refusal to answer on the ground that it may incriminate him——

The Court: You say it is widely known—has it been in the newspapers that he is in the counterfeiting business?

Mr. Gray: No, sir.

* * * * *

At the conclusion of the foregoing argument, the court again ruled that petitioner was required to answer the questions (R. 19). Petitioner, however, "stated in open Court in the presence of his counsel that he would not obey the order of" the court (R. 3, 6). Accordingly, on the following day, October 5, 1950, on petition of the Government (R. 2-4), and pursuant to Rule 42(a), F. R. Crim.

P., Judge Ganey entered a contempt order (R. 4-6) finding that petitioner had been "guilty of misbehavior in the presence and hearing of" the court (R. 5), *viz.*, "forcible resistance in the presence of the Court to a lawful Order thereof" (R. 6). After reciting in the order the facts as heretofore summarized (R. 5-6), Judge Ganey found petitioner guilty of criminal contempt and sentenced him to five months' imprisonment (R. 6).

On the same day, October 5, 1950, petitioner filed a notice of appeal, and bail pending the appeal was denied by the District Court (R. 1). On the following day, October 6, the entire record of the proceedings in the District Court was sent to the Court of Appeals, where it was docketed on October 11 (R. 20).

On October 20, 1950, petitioner filed in the District Court a "petition for reconsideration of allowance of bail pending appeal" (R. 1, 7-8). Attached to this petition as an exhibit was an affidavit (R. 9-10) executed by petitioner on the preceding day. In this affidavit, petitioner called the court's attention to what he described as certain "public facts" (R. 10) concerning the grand jury investigation and his connection therewith, to wit: that the "investigation was stated, in the charge of the Court to the Grand Jury, to cover 'the gamut of all crimes covered by federal statute' "; that petitioner had "been publicly charged with being a known underworld character, and a racketeer with a twenty year police record, including a prison

sentence on a narcotics charge"; that, "while waiting to testify before the Grand Jury, [he] was photographed with one Joseph N. Bransky, head of the Philadelphia office of the United States Bureau of Narcotics"; and that he "was questioned concerning the whereabouts of a witness [Weisberg] who had not been served with a subpoena and for whom a bench warrant was sought by the Government prosecutor" (R. 9). In support of these averments as to the existence of such "public facts," petitioner attached, as appendices to his affidavit, several news items (including the photograph referred to) which had appeared in one or more Philadelphia newspapers over a period of several weeks (R. 11-15). Petitioner further averred in his affidavit that he had "assumed when he refused to answer the questions involved before the Grand Jury, that both it and the Court were cognizant of, and took into consideration, the [foregoing] facts on which he based his refusals to answer" (R. 9); that he had "since been advised, after his commitment, that the Court did not consider any of said facts upon which he relied and, on the contrary, the Court considered only the bare record"—i.e., simply the questions themselves which he had refused to answer (R. 9, 8); and that "on the basis of the above public facts as well as the facts within his own personal knowledge, * * * he had a real fear that the answers to the questions asked by the Grand Jury would incriminate him of a federal offense" (R. 10).

On October 23, 1950, following a hearing in the District Court, petitioner's motion for reconsideration of the order refusing bail was granted, and he was ordered released on $10,000 bail pending appeal (R. 1, 20). On the following day, October 24, petitioner filed in the Court of Appeals what he described as a "Supplemental Record," consisting of the above-mentioned "petition for reconsideration of allowance of bail pending appeal," the supporting affidavit, and the appendices thereto, consisting of the news items (R. 20-21).

On November 3, 1950, the Government filed in the Court of Appeals a motion to strike this "Supplemental Record" from the record on appeal (R. 20-21), on the ground that the "Supplemental Record" was "not offered nor considered by the District Court in the consideration of the merits of the cause, and was considered by the Court below for only one purpose, namely, bail pending appeal, and after the appeal had been taken and after the entire record had been filed in this Court" (R. 21). On December 8, 1950, the motion to strike was granted by the Court of Appeals (R. 21), which also, on the same day, affirmed the contempt conviction (R. 30).

The Court of Appeals' decision granting the Government's motion to strike the so-called "Supplemental Record" as not properly a part of the record on appeal was unanimous (R. 21, 28). However, the judgment of affirmance was by a divided vote (R. 28-29). A majority of the court (Good-

rich and Kalodner, JJ.) were of the view that petitioner's assertion of the privilege against self-incrimination had been unwarranted with respect to all the questions which he had refused to answer (R. 25-26, 29). Judge Hastie, who wrote the single opinion of the court, agreed with the majority that petitioner's invocation of privilege had been improper with respect to one of the two groups of questions to which he had refused answers, *viz.*, those relating to the whereabouts of Weisberg and when petitioner had last seen him (R. 25-26). Speaking for the whole court, Judge Hastie observed with respect to those questions (*ibid.*):

> We do not think appellant's admission that he had seen Weisberg within the week, or had talked to him within the week, or that he knew where he was, or a statement when he last saw him, could come dangerously close to involving him in a federal offense. We cannot see that any answer to this would be likely to differentiate appellant at all or in any significant way from a considerable number of blameless people. It was suggested that he would perhaps be subject to punishment for obstructing justice, pursuant to Sections 371 or 1501 of the Criminal Code.[2] The sole basis for this claim is the

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[2] 18 U. S. C. 371 is the general conspiracy statute. 18 U. S. C. 1501 provides:

"Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States, or United States commissioner; or

> fact, widely publicized, and known to the witness that a subpoena had been issued but not served requiring Weisberg to appear before this grand jury. However, the relationship between possible admissions in answer to the questions asked appellant and the proscription of those sections would need to be much closer for us to conclude that there was real danger in answering. * * *.

However, Judge Hastie was of the view that petitioner was justified in asserting his privilege with respect to the other group of questions, *viz.*, those pertaining to his occupation (R. 28-29). He explained the basis of his conclusion in this respect as follows (*ibid.*):

> The court in this case knew the setting of the controversy. It was a grand jury investigation of racketeering and federal crime in the vicinity. The court should have adverted to the fact of common knowledge that there exists a class of persons who live by activity prohibited by federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation. These considerations indicate a sufficient likelihood of good faith in the claim of privilege to sustain it.

"Whoever assaults, beats, or wounds any officer or other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such writ, rule, order, process, warrant, or other legal or judicial writ or process—

"Shall, except as otherwise provided by law, be fined not more than $300 or imprisoned not more than one year, or both."

The majority's views with respect to this group of questions were explained by Judge Hastie as follows (R. 29):

> It [the majority] believes that the subject-matter of the grand jury's investigation gives no notice to the trial judge of the quality of any particular witness. Many kinds of witnesses come before grand juries and there is no reason for the judge to believe, in the absence of evidence, that any particular witness is so connected with underworld activities that a statement of his occupation will tend to incriminate him. The majority thinks that the witness here failed to give the judge any information which would allow the latter to rule intelligently on the claim of privilege for the witness simply refused to say anything and gave no facts to show why he refused to say anything. Since the judge is and the witness is not the person who is to determine whether the claim of privilege is to be allowed, the majority concludes that the trial judge was right in saying that the witness had shown nothing which entitled him to the privilege which he claimed.[3]

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[3] If, however, at the hearing in the District Court on the question of the propriety of his claim of privilege, petitioner had given the district judge the information which he subsequently supplied in connection with his "petition for reconsideration of allowance of bail pending appeal" (see pp. 8-9, *supra*), the district judge would have been required, the majority thought, to sustain petitioner's claim of privilege with respect to the questions relating to his occupation. The opinion states (R. 28): "Subsequently [i.e., after petitioner's conviction and the initial refusal of bail], on motion for reconsideration o. the matter of bail, the applicant made allegations with respect to his reputation as a racketeer and notorious

ARGUMENT

1. It is well settled that the constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike* v. *United States*, 227 U.S. 131, 144; *Mason* v. *United States*, 244 U.S. 362, 365; *Brown* v. *Walker*, 161 U.S. 591, 599-600. It is equally well settled that, where a witness declines to answer a question on the ground that his answer may tend to incriminate him, he is not the sole judge as to whether the supposed danger is real or fancied; it is for the court, in last analysis, to make this decision on the basis of facts and information brought to its attention. *Mason* v. *United States*, *supra*, 244 U.S. at 365-366; *Brown* v. *Walker*, *supra*, 161 U.S. at 599-600; *The Queen* v. *Boyes*, 1 B. & S. 311, 329-330. It is evident that the question "What is your occupation?" is colorless on its face; consequently, a witness who claims that to answer the question will tend to incriminate him must supply the judge before whom he asserts his privilege with sufficient facts and information to enable him to per-

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underworld figure in Philadelphia, and to newspaper articles which tended to support this reputation both generally and by specific allegation of prior conviction under the narcotics laws, together with a picture of appellant with a narcotics official. This, we think, would rather clearly be adequate to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy." But since "the information offered in support of the bail motion was not before the court when it found appellant in contempt" (*ibid.*), all three members of the court below were in agreement that it could not be considered on the appeal from the conviction.

ceive that, for the particular witness before him, a direct answer to the seemingly innocent and colorless question will indeed be criminatory. The situation confronting the judge in making the decision is, to be sure, somewhat unique in the law, as pointed out in *United States* v. *Weisman*, 111 F. 2d 260, 262 (C.A. 2), since the witness "must prove the criminatory character of what it is his privilege to suppress just because it is criminatory." Hence, "[t]he only practicable solution" to the problem is for the judge "to be content with the door's being set a little ajar" (*ibid.*).

Here, at the hearing before the District Court on the Government's challenge of petitioner's claim of privilege, petitioner gave the court no facts or information whatever in support of his claim that it would be dangerous to him to state the nature of his business. It appears from the transcript of the hearing, pertinent excerpts from which are set forth at pp. 4-7, *supra*, that petitioner's counsel, in arguing to the court that petitioner could properly decline to state his occupation, limited himself to the presentation of a hypothetical situation in which petitioner was assumed to be a counterfeiter. The judge correctly pointed out that the positing of a merely hypothetical case would not do, that there had to be some actual indication or evidence before him that counterfeiting, or other occupation in violation of federal law, was in fact petitioner's occupation be-

fore he could rule that the privilege could be successfully asserted. At the crucial point in the argument, when petitioner's counsel stated that it had "been broadly published that this man has a police record,"[4] the court asked whether it had "been in the newspapers that he is in the counterfeiting business." Upon counsel's concession that it had not been, the matter was dropped.

This being the posture of the case at the time of the hearing on the contempt charges, the court's decision that nothing had been advanced to warrant the assertion of privilege was, we submit, clearly correct. For, as the majority below pointed out, "* * * the subject-matter of the grand jury's investigation gives no notice to the trial judge of the quality of any particular witness. Many kinds of witnesses come before grand juries and there is no reason for the judge to believe, *in the absence of evidence*, that any particular witness is so connected with underworld activities that a statement of his occupation will tend to incriminate him. * * * the witness here failed to give the judge any information which would allow the latter to rule intelligently on the claim of privilege for the witness simply refused to say anything and gave

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[4] Of course, the fact that a witness has a "police record" is not in itself an adequate reason for refusing to state his occupation. It is settled that the danger of self-incrimination, which alone warrants a refusal to answer a question, must relate to incrimination of a federal offense. *United States* v. *Murdock*, 284 U. S. 141, 148; *United States* v. *Murdock*, 290 U. S. 389, 396.

no facts to show why he refused to say anything. Since the judge is and the witness is not the person who is to determine whether the claim of privilege is to be allowed, * * * the trial judge was right in saying that the witness had shown nothing which entitled him to the privilege which he claimed" [italics supplied] (R. 29).[5]

2. Petitioner urges, however, that he did, albeit tardily, eventually bring forward sufficient facts and information to prove that his refusal to state the nature of his business was made in good faith, i.e., that he had a sound fear of incriminating himself if he disclosed his occupation (Pet. 11). He has reference to the newspaper items which he exhibited to the District Court in connection with his renewal of his bail application (see *supra*, pp. 8-9). It was these materials which, in the opinion of all three judges below, would have sufficed, if timely presented, to show that petitioner's

[5] Judge Hastie, dissenting below from these views of the majority, remarked that it is a "fact of common knowledge that there exists a class of persons who live by activity prohibited by federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation"; and he thought that these general considerations in themselves afforded sufficient grounds to warrant the inference that petitioner's claim of privilege had been made in good faith (R. 29). But, even assuming, *arguendo*, that a judge is required to take judicial notice that some witnesses who appear before grand juries investigating violations of federal criminal laws may themselves be violators of those laws, it is obvious that not all witnesses who so appear can be presumed to be violators. And judges confronted with recalcitrant witnesses must be constantly on the alert to guard against attempts by witnesses to use the privilege against *self*-incrimination as a pretext for shielding others. *Brown* v. *Walker*, 161 U. S. 591, 600; *Rogers* v. *United States*, decided February 26, 1951.

assertion of privilege with respect to the questions relating to his occupation had been made in good faith, but which, because not brought forward until after conviction, they unanimously agreed were subject to being stricken from the record on appeal as not forming a proper part of it (*supra*, p. 10, and fn. 3, *supra*, pp. 13-14). Petitioner argues that "since the trial court was furnished with the data prior to the argument of the appeal and since that data admittedly would have made [his] claim of privilege well-founded, * * * at the very least [he] should have been afforded the opportunity to present the facts anew to the trial court" (Pet. 11).[6]

We think that the court below was correct in striking from the record on appeal the "Supplemental Record" containing the newspaper items, since they were not before the District Court at the time of petitioner's conviction, and so could not properly be considered on appeal.[7] We also think that the question of whether or not petitioner should have been permitted to reopen the contempt hearing in the District Court, in order to present for that court's consideration the new data now relied on, was a matter addressed to the sound discretion of the court below, and that there

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[6] Petitioner advanced the same argument to the court below in a petition for rehearing (R. 30-31), which was denied (R. 35).

[7] Cf. Rule 39(a), F. R. Crim. P.; *Edwards* v. *United States*, 312 U. S. 473, 482; *Ray* v. *United States*, 301 U. S. 158, 163-164.

has been no showing that that court's decision denying petitioner this opportunity (see fn. 6, *supra*) was an abuse of discretion. But whether or not we are right in these respects need not, for the reasons which follow, be determined in this case.

We shall assume, *arguendo,* that the production of newspaper articles can in some circumstances suffice to sustain a witness' burden of showing that his answering a given question will tend to incriminate him. Cf. *Kasinowitz* v. *United States,* 181 F. 2d 632, 633 (C.A. 9), certiorari denied, 340 U. S. 920; *United States* v. *Weisman,* 111 F. 2d 260, 262 (C.A. 2). We shall further assume for argument that the court below was correct in concluding that the newspaper items contained in the stricken "Supplemental Record" would have constituted a sufficient showing, if timely advanced, to warrant the sustaining of petitioner's claim of privilege with respect to the questions relating to the nature of his occupation. But it is clear that nothing contained in those items justified petitioner's claim of privilege with respect to the questions relating to his knowledge of the whereabouts of Weisberg, and when he had last seen him. Petitioner states that his "refusal to answer these questions was based on his fear that by so doing he would furnish a 'link in the chain' for a future prosecution for conspiracy to obstruct justice" (Pet. 13). This argument was considered and unanimously rejected by the court below

(R. 25-26; and see pp. 11-12, *supra*, where the court's views on this aspect of the case are set forth *verbatim*). We agree with the court that, even if consideration be given to the news items relating to the fact that a subpoena had been issued, but not served, requiring Weisberg to appear before the grand jury, that fact falls far short of establishing that petitioner's claim of privilege with respect to the "Weisberg" questions should have been sustained. Even taking account of the fact that Weisberg, being desired as a witness, had been subpoenaed but could not be found, there has been no showing (or even suggestion) in the record that petitioner conspired with Weisberg to evade service of the subpoena. A more reasonable explanation of petitioner's desire not to reveal Weisberg's whereabouts, or when he had last seen him, is that he wished to shield Weisberg from interrogation by the Government. This, of course, is not a proper ground for claiming the privilege against self-incrimination. *Rogers* v. *United States*, decided February 26, 1951; *Brown* v. *Walker*, 161 U. S. 591, 600. In any event, it was for petitioner to show that there was some substantial reason why he might incriminate himself by disclosing Weisberg's whereabouts, or the time when he had last seen him, and this he has utterly failed to do.[8]

[8] Petitioner suggests that the validity *vel non* of his claim of privilege with respect to the "Weisberg" questions was rendered moot by the fact that Weisberg subsequently voluntarily appeared as a witness before the grand jury, with the consequence that the Government then no longer needed to

Petitioner's sentence of five months' imprisonment was a general sentence, based upon his refusal to answer all the questions here involved (i.e., the questions relating to his occupation and the "Weisberg" questions). Since, as we have shown, and as the court below unanimously held, his refusal to answer the "Weisberg" questions was without warrant, so far as appears from the record, this general sentence is valid, irrespective of any merit that petitioner's contentions relating to the "occupation" questions may, in the peculiar circumstances here presented, be assumed to have. Cf. *Irving Blau* v. *United States*, 340 U. S. 332, 333, 335; *Pinkerton* v. *United States*, 328 U. S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

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learn Weisberg's whereabouts from petitioner (Pet. 11-12; see R. 31-32). The argument is plainly specious. Petitioner's contempt was complete upon his refusal, without demonstrated good cause, to answer the questions relating to Weisberg's whereabouts. Hence, even assuming that the sole object of the Government in asking petitioner the "Weisberg" questions was to ascertain his whereabouts in order to serve him with a subpoena, the fact that the Government later located Weisberg, with no assistance from petitioner, or that Weisberg voluntarily presented himself, is manifestly of no consequence.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 513

In the Supreme Court of the United States

OCTOBER TERM, 1950

SAMUEL HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 22-29) is reported at 185 F. 2d 617.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1950 (R. 30), and a petition for rehearing (R. 30-34) was denied on December 27, 1950 (R. 35). The petition for a writ of certiorari was filed on January 25, 1951, and was

granted on March 12, 1951 (R. 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rule 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, a witness before a grand jury investigating violations of federal statutes, could lawfully refuse, on the asserted ground that his answers would incriminate him, to answer questions relating to the nature of his occupation, the whereabouts of a subpoenaed acquaintance sought as a witness and when he had last seen or talked with the latter, without any showing, other than the nature of the questions and proceedings, that his answers would in fact tend to incriminate him.

2. Whether the Court of Appeals, in reviewing a judgment of criminal contempt, properly disregarded facts presented by petitioner for the first time in support of a motion for reconsideration of allowance of bail filed in the District Court 15 days after the judgment of contempt and the notice of appeal.

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CRIMINAL PROCEDURE AND CIVIL PROCEDURE INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Rule 39 of the Federal Rules of Criminal Procedure (18 U. S. C., Supp. III, foll. 3771) provides in pertinent part:

(a) *Supervision in Appellate Court.*

The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion * * * for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

(b) *The Record on Appeal.*

(1) *Preparation and Form.* The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules.

* * * * *

Rule 75 of the Federal Rules of Civil Procedure (28 U. S. C., foll. 723c) provides in pertinent part:

* * * * *

RULE 75.—RECORD ON APPEAL TO A CIRCUIT COURT OF APPEALS

* * * * *

(h) *Power of the Court to Correct or Modify Record.*

It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) [forma pauperis case] and (n) [no steno-

graphic report] of this rule and in Rule 76 [agreed statement], but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the circuit court of appeals.

STATEMENT

On September 14, 1950, a grand jury of the Eastern District of Pennsylvania undertook an investigation concerning frauds upon the Government of the United States, involving violations of the customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses (R. 2). On October 3, 1950, petitioner, appearing as a witness before this grand jury, refused to answer certain questions on the asserted ground that his answers might incriminate him of a federal offense

(R. 2, 5, 7). The questions which he refused to answer appear in the following excerpt from the transcript of the grand jury proceedings (R. 3, 5-6):

> Q. What do you do now, Mr. Hoffman?
> A. I refuse to answer.
> Q. Have you been in the same undertaking since the first of the year?
> A. I don't understand the question.
> Q. Have you been doing the same thing you are doing now since the first of the year?
> A. I refuse to answer.
> Q. Do you know Mr. William Weisberg?
> A. I do.
> Q. How long have you known him?
> A. Practically twenty years, I guess.
> Q. When did you last see him?
> A. I refuse to answer.
> Q. Have you seen him this week?
> A. I refuse to answer.
> Q. Do you know that a subpoena has been issued for Mr. Weisberg?
> A. I heard about it in Court.
> Q. Have you talked with him on the telephone this week?
> A. I refuse to answer.
> Q. Do you know where Mr. William Weisberg is now?
> A. I refuse to answer.

Later on the same day, October 3, petitioner and his counsel appeared in open court before the District Court (Ganey, D. J.), and the Government challenged petitioner's claim of privilege (R. 2, 5). The court, after hearing the questions and answers *supra*, and after hearing argument by

petitioner's counsel,[1] found that "there was no real and substantial danger of incrimination to [petitioner] for a Federal offense" and ordered him to reappear before the grand jury and answer the questions (R. 5).

On the following day, October 4, 1950, petitioner and his counsel again appeared in open court before Judge Ganey. It appears that the judge at that time permitted counsel to renew his argument of the preceding day in support of his claim that petitioner's refusal to answer the questions was based on a proper claim of privilege. The gist of the argument appears in the following excerpt from the transcript (R. 17-19):

> Mr. Gray [counsel for petitioner]: * * * while Your Honor was, and you always are, sir, extremely patient in listening to the presentation I made yesterday in the matter, I would like to emphasize one fact that I put yesterday to Your Honor, and that is when this man was asked what was his business, I argued to Your Honor that he would have the right to refuse to answer on the ground that it might incriminate him of a Federal offense. I now put the hypothetical question to Your Honor, suppose this man was engaged in counterfeiting?
>
> If he answers the question, he answers it truthfully, and if he does not answer it truthfully, he will be subjected to the penalties of

[1] The argument made by counsel on October 3 is not contained in the printed record, except by indirect newspaper report at R. 13. Extracts from counsel's argument of the following day are set forth, *infra*, pp. 6-9.

perjury. If he answers it truthfully, he certainly is incriminating himself of having been guilty of an offense under the United States Law.

* * * * * *

Mr. Goldschein [Counsel for the Government]: I think, may it please the Court, that before a witness can be given privilege against self-incrimination that the obvious answer to the question must be such that the Court can determine from the question, if the question is answered in the affirmative, that it would incriminate him. Other than that, the witness must give the Court sufficient so that the Court can determine.

The Court: Yes, I think that is right. I ask, what is your job——

Mr. Gray: May I say, before that——

The Court: Excuse me, Mr. Gray. That may be laid in an environment and under such circumstances from which the only inference that can be drawn—I cannot say that he is a counterfeiter—I think I have the right to presume he is engaged in a lawful occupation.

Mr. Gray: My friend does not answer the question and Your Honor does not answer it. Suppose the man is in the counterfeiting business. He is asked the question, What is your business?

He knows he is a counterfeiter; it is his only business; he cannot answer the question because it would incriminate him. What can he say? He cannot say, "I refuse to answer the question because I am in the counterfeiting business, or I refuse to answer the question because it might incriminate me under the Federal laws; he happens to be a counterfeiter. What are you going to do about that?

The Court: I know, but the whole background—I think it must be laid in a back-

ground from which the Court can glean that he is in the counterfeiting business. The mere asking of the question, "What business are you in?"——

Mr. Gray: Well, he is in the counterfeiting business.

The Court: —does not warrant the assumption that he is in the counterfeiting business. He may be in the counterfeiting business. I have to go one step further, don't I, and make the assumption, don't I, that he is in the counterfeiting business or may be——

Mr. Gray: No, not at all. He is actually in the counterfeiting business. He is actually in the business.

The Court: I don't know that.

Mr. Gray: You don't know that, but he knows it in his own mind. How is he going to do more than say, "I refuse to answer on the ground that it may incriminate me"? He cannot explain that he is in the counterfeiting business, and that is why it would incriminate him, because he is then incriminating himself.

The Court: All right, let us take myself. Suppose I were summoned before the Grand Jury; they say, "What is your business?" I say, I refuse to answer on the ground of self-incrimination.

Mr. Gray: Your illustration——

The Court: I don't know. I don't know what Hoffman does.

Mr. Gray: Your illustration is not very good. It has been broadly published that this man has a police record——

The Court: I don't know it.

Mr. Gray: —that he is not a character that belongs on the bench, or a character that belongs at the bar.

The Court: That I really don't know.

Mr. Gray: Wait; that is no answer to the fact that he may be in the counterfeiting business, and being in the counterfeiting business, if he makes any other explanation than refusal to answer on the ground that it may incriminate him——

The Court: You say it is widely known—has it been in the newspapers that he is in the counterfeiting business?

Mr. Gray: No, sir.

The Court: I am going to sustain——

Mr. Gray: Will Your Honor allow this argument to be made of record the same as yesterday?

The Court: Yes, sir; yes, indeed.

Mr. Gray: Will Your Honor allow something else to be placed on record? I don't know that it is there—that there has been a subpoena issued for Weisberg some several weeks ago and that he has not appeared in answer to the subpoena?

The Court: If that is the fact.

Mr. Goldschein: Those are facts.

On the same day, October 4, 1950, petitioner "stated in open Court in the presence of his counsel that he would not obey the order of [the] Court and answer the questions which the Court directed him to answer" (R. 3, 6). Accordingly, on the following day, October 5, 1950, upon petition of the Government (R. 2-4), Judge Ganey entered an order under 18 U. S. C. 401 and Rule 42(a), F. R. Crim. P. (R. 4-6) finding that petitioner had been "guilty of a contempt of [the] Court by misbehavior in its presence and by a forcible resistance in the presence of the Court to a lawful Order

thereof" (R. 6). After reciting in the order the facts as heretofore summarized (R. 5-6), Judge Ganey found petitioner guilty of criminal contempt committed on October 3, 1950, and sentenced him to five months' imprisonment (R. 6).

On the same day, October 5, 1950, petitioner filed a notice of appeal. Bail pending the appeal was denied (R. 1). On the following day, October 6, the entire record of the proceedings in the district court was sent to the Court of Appeals, where it was docketed on October 11 (R. 20).

On October 20, 1950, petitioner filed in the district court a "Petition for Reconsideration of Allowance of Bail Pending Appeal" (R. 1, 7-8). Attached to this petition as an exhibit was an affidavit (R. 9-15) executed by petitioner on the preceding day. Petitioner averred in the petition "that on the basis of the facts contained in his affidavit * * * he was justified in his refusal to answer the questions as aforesaid, or, in any event, that there is so substantial a question involved that [petitioner] should be released on bail * * *. Wherefore, your petitioner prays that he be released on bail pending his aforesaid appeal" (R. 8). In the affidavit, petitioner stated, *inter alia:* that when he refused to answer the questions he assumed that both the grand jury and the court "were cognizant of, and took into consideration, the facts on which he based his refusals to answer," that he had "since been advised, after his

commitment, that the Court did not consider any of said facts" and "considered only the bare record" [only the questions and answers]; that in "the interest of justice and particularly in aid of a proper determination of" the petition for allowance of bail, he submitted "the following in support of his position that he genuinely feared to answer the questions * * *"; that the investigation "was stated, in the charge of the Court to the Grand Jury, to cover 'the gamut of all crimes covered by federal statute' "; that petitioner had "been publicly charged with being a known underworld character, and a racketeer with a twenty year police record, including a prison sentence on a narcotics charge"; that, "while waiting to testify before the Grand Jury, [he] was photographed with one Joseph N. Bransky, head of the Philadelphia office of the United States Bureau of Narcotics"; that he "was questioned concerning the whereabouts of a witness who had not been served with a subpoena and for whom a bench warrant was sought by the Government prosecutor" and that on "the basis of the above public facts as well as the facts within his own personal knowledge, [petitioner] avers that he had a real fear that the answers to the questions asked by the Grand Jury would incriminate him of a federal offense" (R. 9-10).

In support of these averments petitioner attached, as appendices to his affidavit, several news-

paper clippings (including the photograph re-referred to) (R. 11-15).[2]

On October 23, 1950, following a hearing in the district court, petitioner's motion for reconsideration of the order refusing bail was granted, and he was ordered released on $10,000 bail pending appeal (R. 1, 20). On the following day, October

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[2] The first of these clippings (R. 11) bore the handwritten date "9/14/50". The name of the newspaper was not indicated. It bore headlines "Gambler Called in Racket Probe" and "Cappy Hoffman among First Three Witnesses." It stated, *inter alia:*

"Samuel (Cappy) Hoffman, a gambler with a 20-year police record, and two other witnesses [Segal and Lit, not identified as criminals] were summoned today before the federal grand jury investigating rackets * * *. Goldschein said they and Hoffman would be questioned about gambling. * * * Hoffman's record includes a conviction and prison sentence on narcotics charges, an acquittal for murder, and innumerable arrests on gambling charges.

"His early operations were out of Atlantic City and he was once described by top Philadelphia police officials as 'the king of the shore rackets who lives by the gun.'

"*Named With Nig Rosen*

"More recently they named him and Nig Rosen as two of the men trying to 'organize' the numbers racket in this area. Last August, the Senate crime investigating committee put Hoffman's name on a list of 'known gangsters' from the Philadelphia area who made the Sands Hotel, Miami Beach, their headquarters.

"Hoffman's murder acquittal was in 1942 at Mays Landing. A jury found him not guilty of the murder of Michael Tenerelli, alias Mickey Blair, a former fighter, who was shot six times in the back outside his Pleasant Bay Inn in Atlantic City. Hoffman charged he was 'framed.'

* * * * *

"Goldschein said that the investigation will include allega-

24, a "Supplemental Record," consisting of the above-mentioned "Petition for Reconsideration of Allowance of Bail Pending Appeal," the supporting affidavit, and the appendices thereto, consisting of the news items, and additional docket entries were filed in the Court of Appeals (R. 20-21).

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tions made against one GI school and veterans attending another.

* * * * *

"The investigation is to run the full gamut of all the rackets, including illegal drugs, bootlegging, gambling, smuggling, white slavery, and their offshoots.

"Goldschein said that 20 subpoenas were in the first batch to go out, but that nine of these remain unserved.

" 'We are having trouble finding some big shots,' he said."

The clipping from the Sunday Bulletin, September 24, 1950 (R. 14) contained a picture showing petitioner with the head of the local U. S. Bureau of Narcotics, and referred to petitioner as an "erstwhile bigtime gambler" shown in a "who me?" vein. The clipping marked "9/29/50" (R. 15) dealt with Government efforts to obtain bench warrants for a number of persons, including Weisberg. The clipping quoted attorney Gray (petitioner's counsel) as opposing the issuance of the warrants, and as stating, "Just because [Government counsel] says he cannot find a man, it doesn't mean that the man is evading him, nor is it grounds for 'bench warrant.' "

A clipping marked "10/3/50" (R. 13), a clipping marked "10/4/50" (R. 12), and another clipping of apparently the latter date (also R. 12) reported petitioner's refusal to answer questions on October 3, 1950, referring to petitioner as "long known to police as an underworld character" and adverting to petitioner's "prison sentence on a narcotics charge, an acquittal on a murder charge, and numerous arrests for gambling." The clipping of October 3 (R. 13) also reported petitioner's counsel to have argued that "the line of questioning * * * might eventually involve income tax matters."

On November 3, 1950, the Government filed in the Court of Appeals a motion to strike this "Supplemental Record" and the additional docket entries from the record on appeal (R. 20-21), on the ground that the "Supplemental Record" was "not offered nor considered by the District Court in the consideration of the merits of the cause, and was considered by the Court below for only one purpose, namely, bail pending appeal, and after the appeal had been taken and after the entire record had been filed in this Court" (R. 21). On December 8, 1950, the motion to strike was granted by the Court of Appeals (R. 21). On the same day, the court affirmed the contempt conviction (R. 30). The decision of the court was unanimous in granting the motion to strike (R. 21, 28) and in holding that petitioner's refusal to answer the questions relating to Weisberg constituted contempt (R. 25-26). A majority of the court (Goodrich and Kalodner, JJ.) were of the view that petitioner's assertion of the privilege against self-incrimination had also been unwarranted with respect to the question as to occupation (R. 29). Judge Hastie, who wrote the single opinion of the court, agreed with the majority that petitioner's claim of privilege was not valid with respect to the questions relating to Weisberg (R. 25-26) but disagreed with respect to the questions concerning petitioner's occupation (R. 28-29).

On December 21, 1950, petitioner filed a petition for rehearing (R. 30-34) asking, *inter alia*, the opportunity to argue for a remand of the case to the district court to permit petitioner to present to the district court the data contained in the petition with respect to bail "in a motion for reconsideration of the sentence" (R. 31). The petition was denied on December 27, 1950 (R. 35).

SUMMARY OF ARGUMENT

The petitioner refused to answer two groups of questions, the first group relating to the nature of his occupation, the second to the whereabouts of Weisberg. It is the government's contention that he was properly ordered to answer both groups of questions. However, the court's finding that he was in contempt was not based on any particular question, but on his refusal to obey the court's order to answer them all. The judgment should be sustained, therefore, if the claim of privilege was invalid as to either group of questions since the petitioner's failure to obey the court's order where he had no privilege cannot be excused because he was justified in refusing to answer other questions. Petitioner's sentence of five months' imprisonment was a general sentence which was within the court's discretion to impose if he was properly held in contempt in any respect.

1. When a witness asserts his Constitutional privilege not to incriminate himself, and where the

question is not incriminating on its face, the issue arises whether his bare assertion that his answer will tend to incriminate him is sufficient. The answer to literally any question may in some circumstances be incriminating and therefore, there would be an end to the compulsion on witnesses to testify at all if some support were not required for the bona fides of the claim. It is now generally held that in such cases the witness must make a showing that under all the circumstances there is a real danger that the answer may incriminate him.

The application of this requirement that the witness make a showing as to the reality of the danger is particularly important when the question calls for an answer which witnesses may customarily give without implicating themselves. The questions put to the petitioner with respect to his occupation were of this nature since they are of the type customarily asked to identify and qualify a witness, even though it is possible that, if his business was, for example, the sale of narcotics, he could not answer without disclosing a federal offense.

Since the answer to the questions asked petitioner would not in ordinary circumstances involve incrimination, it was incumbent on petitioner to make some showing that as to him there was a real likelihood of danger in answering them. Care must then be taken, however, not to require

a showing which would vitiate the privilege. But in the absence of such showing there is no way in which a court can determine whether a claim is made in good faith. In the present case, no showing whatsoever was made. The court had no possible way of knowing whether petitioner was a potential defendant in a federal criminal case, or whether he had merely been called to give evidence which would be helpful in tracking down others. Under these circumstances it is submitted that the court quite properly held that he had not established the bona fides of his claim and was therefore not justified in refusing to answer.

2. The questions asked with respect to his contacts with Weisberg could not call for answers which would disclose an element of a crime. The greatest harm that they could do the witness would be to establish that he had had the opportunity to conspire with Weisberg to obstruct justice. But the court below properly held that the witness had not show any circumstances indicating that there was any real danger to him on that ground. There was no evidence that Weisberg was avoiding the service of a subpoena and, in fact, he later appeared. The refusal to answer the question as to Weisberg's whereabouts was equally without foundation and equally remote from any apparent danger to the witness. On the facts presented it could only appear to the Court that the witness was attempting to hide behind the privilege in or-

der to shield another. This is, of course an improper ground for asserting the privilege.

Petitioner now argues that his refusal to answer the questions about Weisberg lost significance when the latter subsequently appeared and testified. This argument loses sight of the fact that the conviction was for criminal contempt and that the contempt had been completed and the petitioner tried and sentenced before Weisberg made his appearance.

It should also be noted that the supplemental record, which the Court of Appeals refused to consider in reviewing the conviction, would not, even if properly before the court, have materially aided the petitioner in supporting his claim with reference to this group of questions.

3. Petitioner asserts that the showing which he made before the district court in connection with an application for reconsideration of bail pending appeal should have been considered by the Court of Appeals in reviewing the conviction for contempt or, at least, that the case should have been remanded to the district court in order that it could have reconsidered the convictions on the basis of the additional showing.

The material was submitted to the district court on a bail application after the completion of the contempt proceeding, after the time for a motion for a new trial had expired, after appeal had been taken, and after the record had been forwarded to

the Court of Appeals and the appeal docketed. It was never considered by the district court on the question of whether the petitioner was in contempt. Obviously since it was not part of the record on which the petitioner had been convicted, it was not a part of the record on which the Court of Appeals could review the correctness of the conviction.

Nor was the additional information a proper ground for a remand to the district court. Courts of appeals do not order district courts to retry cases merely because appellants believe that they can make a better case by introducing different or additional evidence than that which they chose to present on the original trial. Law suits would never be concluded if that were the situation. If the evidence were newly discovered, petitioner could move for a new trial at any time within two years of the conviction, but the application would clearly have to be made to the district court, not to the Court of Appeals. Petitioner's attempt to frame his issue as one involving a waiver of consitutional rights is without foundation, since his constitutional rights were in fact stoutly asserted throughout and the only question involved is whether he should have been given the chance to retry his case.

ARGUMENT

The questions asked the petitioner fall into two groups, (a) the questions as to the nature of the witness's business and (b) the questions as to his contacts with, and the whereabouts of, Weisberg. The answers to the first group might incriminate a witness in the unforeseeable circumstance that his business was itself illegal under federal law. The answers to the second group could, at most, disclose evidence which could conceivably be used to prove some unspecified collateral fact involved in a later prosecution for some unidentified offense.

The privilege against self-incrimination was construed in the proceedings against Aaron Burr to protect a witness against disclosure of "a fact that would form a necessary and essential part of a crime which is punishable by the laws." *United States* v. *Burr*, 25 Fed. Cas. 38, 40, No. 14,692e. This construction was seemingly extended in *Counselman* v. *Hitchcock*, 142 U. S. 547, 585, by the following language:

> * * * It is a reasonable construction, we think, of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him."

The most recent statement of this Court on the scope of the protection afforded is found in *Blau* v. *United States,* 340 U. S. 159 at 161:

> * * * Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent.

Accepting these principles, we believe the issue in this case is whether a witness can refuse to answer questions which on their face do not call for incriminating answers without making any showing to justify the court in finding that his claim of privilege is bona fide rather than a sham to avoid answering questions for some ulterior reason. The issue is an important one because the right of the State to compel witnesses to disclose information which may be necessary to the administration of justice should not be impaired to any extent that is not necessary to protect witnesses whose answers would place them in actual jeopardy. Abuse of the privilege must be discouraged in order that it not be debased.

One preliminary matter requires brief discussion before turning to the merits of the case. The

petitioner refused, after being ordered to do so by the judge, to answer six specific questions. The petition that he be held in contempt was based on all of the questions (R. 3), and the court's finding that the witness was in contempt was similarly based on his refusal to answer each of them (R. 6). The conviction should be sustained, therefore, if the claim of privilege was invalid as to any of the questions since the petitioner's failure to comply with the court's order to answer any one of them as to which he had no privilege cannot be excused because he was justified in refusing to answer other questions. Petitioner's sentence of five months' imprisonment was a general sentence which was within the court's discretion to impose if he was properly held in contempt in any respect. See *Pinkerton* v. *United States*, 328 U. S. 640, 641, n. 1; *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *Blau* v. *United States*, 340 U. S. 332, 335 (dissenting opinion).

I

THE WITNESS DID NOT MAKE A SUFFICIENT SHOWING OF THE DANGER OF SELF-INCRIMINATION TO JUSTIFY HIS REFUSAL TO ANSWER THE QUESTIONS CONCERNING THE NATURE OF HIS OCCUPATION.

The questions put to the petitioner as to the nature of his occupation were, on their face, wholly colorless. They are the very type of questions al-

most invariably asked of all witnesses in order to identify them and to aid the jurors or the courts in evaluating the testimony to follow. There is no implication from the questions themselves that the answers will be anything but routine. If witnesses were permitted to refuse to testify solely on their bare claim of privilege there would be nothing to prevent recalcitrant witnesses from hiding behind the privilege against self-incrimination whenever they were disinclined to answer a question for any reason whatsoever.

The courts in this country were early faced with the problem of how to distinguish between a *bona fide* claim of privilege and an attempt to use the privilege for ulterior reasons. In 1807 Chief Justice Marshall laid down the following test (*United States* v. *Burr* (*In re Willie*), 25 Fed. Cas. No. 14,692e, pp. 38, 40):

> When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be.

In that case Burr's secretary was called by the government to identify a letter written in cipher.

He refused to answer a question as to whether he understood the cipher at the time the question was asked. The conclusion of Chief Justice Marshall was that the answer would not incriminate him since it only asked for his present knowledge, rather than knowledge at the time he was alleged to have copied the letter. The latter, the court believed, would have implicated him in the charge of treason. However, it is obvious that under certain circumstances, even the witness's present knowledge might implicate him since it might have been derived from knowledge at the time he made the copy. It seems probable that if the witness had stated that any knowledge he presently had was the same as that he had at the time of the copying, his plea of privilege would have had to be upheld for he would then have provided the court with the additional circumstances that there was a real danger that his answer would incriminate him. In the absence of that showing the witness was required to answer.

Later cases have made explicit what was implicit in the *Burr* decision, namely, that whenever it does not appear from the nature of the question, or the evidence already before the court at the time the question is asked, that the answer may imperil the witness, then, even though it is possible that the answer can incriminate the witness, his bare claim of the privilege is not sufficient. The witness must go further and indicate in some way that his

claim has a real foundation in fact, and is not made in bad faith. A case frequently cited as expounding this rule is *The Queen* v. *Boyes,* 1 B. & S. 311, 121 English Reports (Full Reprint) 730 (1861). Cockburn, C.J., there stated at 329-330:

> * * * It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law: and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive.
>
> With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by Lord Wensleydale, in *Osborn* v. *The London Dock Company,* 10 Exch. 698,701, and acted upon by V. C. Stuart, in *Sidebottom* v. *Adkins,* 3 Jur. N. S. 631, is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.

This language has been quoted with approval by this Court in *Brown* v. *Walker,* 161 U. S. 591, 599-600, and in *Mason* v. *United States,* 244 U. S. 362, 365. Professor Wigmore refers to the decision by Mr. Justice Mitchell in *State* v. *Thaden,* 43 Minn. 253, 45 N. W. 447 (1890), which in turn adopts the rule expressed in *The Queen* v. *Boyes,* as one

which "leaves nothing to be added, and [which] ought to remain the last word in the development of the rule." *VIII Wigmore on Evidence* (3rd ed. 1940) 406.

This is the rule which the court below adopted, although the judges divided on its application. The court stated (R. 27):

> The claimant of privilege must show the court enough beyond his bare statement of crimination at least to indicate that his claim was not clearly groundless, a contumacious assertion made in bad faith.

The only difficulty in applying the test is not whether the showing must be made, but how far the witness must go in order that the showing can be considered sufficient. This difficulty was well expressed by Judge Learned Hand in *United States* v. *Weisman*, 111 F. 2d 260, 262:

> Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.

At the time the witness in the present case was found in contempt the trial court had been pre-

sented with no circumstance, other than the nature of the grand jury proceedings, which could serve to buttress the claim of privilege. The majority of the court below believed that the nature of the proceeding was not enough since, so far as it appeared, the witness might well not have been a person implicated in any crime but an innocent outsider whose testimony might be helpful in tracking down the subjects of the investigation. Obviously many, perhaps most, witnesses called before juries are sources of information rather than potential defendants. Therefore, the majority of the court held that in order to avoid answering the colorless questions about his occupation, the witness must present some substantial basis on which the court could determine that the answers to the questions might put him in danger of prosecution.[3]

Judge Hastie, disagreeing with the majority, felt that the facts that the grand jury was investigating racketeering and federal crime, and that there is a class of persons who make their living through activities prohibited by federal law, were

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[3] Hypothtical assumptions by his counsel on oral argument before the court cannot be deemed a showing of circumstances. Counsel's statements that the witness might have been a counterfeiter were intended to point up his legal proposition, not to establish a factual background. Moreover, as was indicated in *United States* v. *St. Pierre*, 128 F. 2d 979, 981 (C. A. 2), the court "must be apprised, in some more dependable manner than the mere statement of counsel, how the answer will incriminate the witness before he can allow the suppression of the truth."

enough to indicate to the court the likelihood that the privilege was claimed in good faith. This position goes further than is necessary in the circumstances to protect the witness. It is entirely possible that the witness's claim was based not on the inherently illegal character of his business, but on his fear of disclosing an offense punishable under state law or the possibility that an income tax violation might be alleged because of his failure to disclose income received from a business not prohibited by federal law. It has been held that neither of these grounds is sufficient.[4] In *United States* v. *Greenberg*, 187 F. 2d 35 (C. A. 3) (petition for certiorari pending, No. 586), questions very similar in purport to those here involved were asked, but the witness's claim of self-incrimination was specifically grounded on the fact that his answer might involve him in a prosecution for violation of the withholding provisions

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[4] Illegality of his business under state law would not support his claim since this Court has definitely determined that the privilege provided by the Fifth Amendment relates only to incrimination with respect to federal offenses. *United States* v. *Murdock*, 284 U. S. 141, 148; *United States* v. *Murdock*, 290 U. S. 389, 396; *Feldman* v. *United States*, 322 U. S. 487.

It has also been held that a witness may not refuse to disclose the nature of his business merely because the method in which he has conducted his business may have involved a violation of the federal tax laws. *United States* v. *Weinberg*, 65 F. 2d 394 (C. A. 2), certiorari denied, 290 U. S. 675; *Camarota* v. *United States*, 111 F. 2d 243 (C. A. 3), certiorari denied, 311 U. S. 651.

of the income and social security tax laws. The court, of which Judge Hastie was a member, held unanimously that the claim should not be allowed. It would indeed be anomalous if a naked claim of privilege were upheld, whereas a non-incriminatory disclosure of the basis of the claim were to lead to the opposite result. The two cases illustrate that invalid claims can be uncovered without impairment of the witness's fundamental rights.[5]

Actually, in the present case, the petitioner has himself given the answer as to how he could have shown additional circumstances which would have satisfied the court below as to the basis on which he was claiming the privilege. In his petition for reconsideration of allowance of bail pending appeal, he set forth facts that indicated that he might well have been one of the subjects of the grand jury investigation. The exhibits attached to his petition indicated that he had "been publicly charged

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[5] It would seem appropriate for trial judges to exercise initiative in exploring the grounds for the claim of privilege. Even though the witness or his counsel fail to suggest the circumstances on which the claim is based (perhaps in some cases because it is to their advantage not to do so), the trial judge can make general inquiries of the parties which will negative unsound grounds for the assertion of the privilege and aid him in determining whether there is any real basis on which it should be upheld. In appropriate cases he can also examine the grand jury minutes and, perhaps, even question the witness in his chambers.

with being a known underworld character, and a racketeer with a twenty year police record, including a prison sentence on a narcotics charge." A picture attached showed him waiting to testify before the grand jury in the company of the head of the Philadelphia office of the United States Bureau of Narcotics. The picture shows him pointing at himself and the caption under it states that he appears in a "who me?" vein, which might indicate that he was being accused. We shall discuss in Point III, *infra*, whether the court below properly refused to consider this material. The point we make now is that this particular witness, without endangering himself in any way, could have presented circumstances which the court below indicated would have satisfied it that he had real reason to fear incrimination (R. 28).

It is true that not all witnesses would be able to show the circumstances supporting their claims of privilege in the same way. But if they have criminal records, it cannot incriminate them to disclose them; if they are being subjected to a current investigation, they can say so; if their associates have been accused of violations, they can bring that to the attention of the court. The very least that they can do is to indicate whether what they fear is that the nature of the business involves a federal criminal offense or whether the type of business is only indirectly involved.

The witness in the present case did none of these things. If his right to the privilege had been upheld, it would stand for the proposition that a bare claim to privilege during a grand jury investigation, without more, suffices. Courts in the past have always been able to find some method by which more could be shown to establish the bona fides of the claim without imperiling the witness. In this case the petitioner has demonstrated that more could have been done. Therefore, it is submitted that the court below arrived at a sound conclusion in determining that the privilege was not properly claimed.

II

The Witness Did Not Make a Sufficient Showing of the Danger of Self-Incrimination to Justify His Refusal to Answer the Questions With Respect to Weisberg.

The four questions dealt with in this portion of the brief are: 1) "When did you last see him [Weisberg]?"; 2) "Have you seen him this week?"; 3) "Have you talked with him on the telephone this week?"; and 4) "Do you know where Mr. William Weisberg is now?" The witness refused to answer all four questions on the ground that the answers might incriminate him of a federal offense (R. 7). The court ordered him to answer, and held him in contempt when he again refused.

The only facts before the judge at the time of the refusal to testify were: 1) A subpoena had been issued to Weisberg to appear before the grand jury but he had not appeared (R. 19). 2) The grand jury investigation in which the subpoena had been issued and in which the petitioner was being questioned was an investigation of a wide range of federal crimes. (R. 2). There was nothing before the judge to indicate that Weisberg was evading process; indeed he later appeared and testified (R. 31). The court had no reason whatsoever to conclude that to talk with Weisberg (whom the witness admitted having known for twenty years) (R. 3) or to know of his whereabouts could reveal any crime or disclose any link of evidence necessary to convict the witness. From the facts before it, the court could only conclude that the witness was attempting to shield Weisberg from the necessity of appearing and testifying.

It is, of course, well settled that the privilege against self-incrimination is for the protection of the witness alone and that the desire to shield others is not a proper ground for a refusal to testify. *Rogers* v. *United States,* decided February 26, 1951, p. 4 of slip opinion; *United States* v. *Murdock,* 284 U. S. 141, 148; *Hale* v. *Henkel,* 201 U. S. 43, 69-70; *Brown* v. *Walker,* 161 U. S. 591, 609.

Petitioner urged below (R. 25) and again urges in his brief here (Br. 13) that the witness's refusal to answer these questions was based on his fear

that by so doing he would furnish a link in the chain of evidence for a future prosecution for conspiracy to obstruct justice under Sections 371 or 1501 of the Criminal Code. Assuming that this was the basis for his apprehension, his claim of privilege was properly overruled for two very good reasons. First, he utterly failed to present to the court any circumstances from which the court could determine the basis of his claim and therefore whether it was advanced in good faith or for an ulterior purpose. Second; on the basis of the standards customarily applied, even if the court had been advised as to the basis of the claim, the incriminatory factor in the answers to the questions propounded was so minute and remote that in the exercise of sound judicial discretion the court would in any event have rejected the claim.

We have already discussed the necessity of the witness's establishing a basis for his claim in Point I. But it is even more apparent that there is a necessity for partial disclosure in such a case as this where there is no clue from the questions themselves as to how the witness may be placed in danger by answering. At the same time there is less danger in making a partial disclosure since the questions do not call for an answer which can disclose any essential element of a crime.

If the courts did not require a showing of the circumstances in the case of such innocent questions as these, there would quite literally be an

easy escape to any witness from compulsion to answer any question; for it is possible to conceive of situations in which the most harmless question can evoke an answer which could be used against the witness. In *Ex Parte Irvine,* 74 Fed. 954, 960, (C. C. S. D. Ohio, 1896) Taft, J., pointed this out:

> It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.

United States v. *Weisman,* 111 F. 2d 260 (C. A. 2) affords an example of questions which bear on their face no indication of the incriminating nature of the answers. The witness was asked whether he had received cables at a certain restaurant and whether he knew any one in Shanghai. The witness then offered evidence to show that the government was conducting a prosecution for importing narcotic drugs from Shanghai and that cables addressed to a certain individual at the named restaurant were involved. The court held

that these circumstances met the necessity and that the claim should have been respected.

More recently, the questions involved in *United States* v. *Rosen*, 174 F. 2d 187 (C. A. 2), certiorari denied, 338 U. S. 851, were certainly innocuous on their face since they dealt only with what appeared to be a legitimate purchase of a Ford automobile. The court stated that the burden was on the witness to justify his refusal to answer by making it appear that there was substantial reason to believe that the answers might incriminate him. This was accomplished to the satisfaction of the Court of Appeals by tying the transaction in with an alleged Communist espionage plot.

In the present case however, the witness came forward with no showing of how the answers might incriminate him and on that ground alone his claim was properly denied.

It need scarcely be pointed out that the questions, far from indicating an effort to ascertain petitioner's crimes, had the obvious purpose of locating Weisberg so that his testimony might be obtained. This is not denied, but in fact admitted, by petitioner. (R. 31.)

But even if we assume that the court through some undisclosed method had been able to ascertain the circumstances now pressed by the petitioner and had understood that the basis of the witness's claim was that his statements might be used against him in a subsequent prosecution for

conspiring with Weisberg to obstruct justice, the evidence is so far removed from the elements of the crime that the claim still should have been disallowed. Assume, for the argument, that the direct answers to the questions would have been that he had seen Weisberg within the week, had talked with him on the telephone, and that Weisberg was then in Mexico. The fact that the conversations took place, and that Weisberg was in Mexico, which were the only answers called for by the questions, would hardly advance the Government's case appreciably. These facts are certainly less directly connected with any crime than whether Willie understood the cipher in *United States* v. *Burr,* 25 Fed. Cas. No. 14,692e, or whether the witness had seen others sitting at the table with him in the act of gambling in *Mason* v. *United States,* 244 U. S. 362, both of which questions were required to be answered.

The following decisions afford further examples of questions which have been required to be answered: *Camarota* v. *United States,* 111 F. 2d 243 (C. A. 3), certiorari denied, 311 U. S. 651 (questions as to sale of wire service to "horse rooms," although possible further questions as to amounts thus received might have evidenced federal income tax violations); *United States* v. *Flegenheimer,* 82 F. 2d 751 (C. A. 2) (question asked D in tax prosecution of F "Do you know H?", that being alias of F); *United States* v. *Weinberg,* 65 F. 2d 394

(C. A. 2), certiorari denied, 290 U. S. 675, questions asked W, in liquor violation prosecution of F, whether signature on bank card was his own, and as to business in which engaged); *United States* v. *McGovern,* 60 F. 2d 880, 881-882 (C. A. 2), certiorari denied, 287 U. S. 650 (questions as to payments of money to certain union officials); and *O'Connell* v. *United States,* 40 F. 2d 201 (C. A. 2), certiorari dismissed per stipulation of counsel, 296 U. S. 667 (questions in a lottery investigation, as to whether witness was acquainted with certain persons "presumably * * * thought by the grand jury to have some connection with the [lottery] pool," p. 204).

The constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike* v. *United States,* 227 U. S. 131, 144. The duty of determining whether the danger is real or fanciful is primarily for the trial judge, as this Court stated in *Mason* v. *United States,* 244 U. S. 362, 366:

> The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject.

> Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

In order to support the apparent weakness of his case in this respect, petitioner goes on to suggest that even though the direct answers would not themselves have been incriminating, nevertheless, the next series of questions and answers would have been (Br. 13).[6] It is futile to speculate what the succeeding questions would have been, but, since the Government was quite properly trying to locate Weisberg, and since the subsequent question actually asked was, "Do you know where Mr. William Weisberg is now?", it cannot be assumed that an attempt was being made to trip the petitioner into an admission of a conspiracy, but rather to ascertain whether he had been informed where Weisberg could be found. Whatever the next question might have been, the contempt was committed with respect to the specific questions which were in fact asked. It is well established that the courts must decide whether to allow a claim on the basis of the particular questions asked, not on what the witness anticipates will follow. *Camarota* v. *United States,* 111 F. 2d 243, 245 (C. A. 3), certiorari denied, 311 U. S. 651;

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[6] The court's finding that there would be no incrimination would *per se* eliminate any contention that petitioner would effect a waiver by answering. There would therefore be no difficult problem for the witness as to when to stop. His answer that he had spoken to Weisberg would not require him to disclose any criminal aspects of the conversation.

United States v. *Flegenheimer,* 82 F. 2d 751, 752 (C. A. 2); *O'Connell* v. *United States,* 40 F. 2d 201, 204 (C. A. 2).

The petitioner cites *Doran* v. *United States,* 181 F. 2d 489 (C. A. 9) and *United States* v. *Cusson,* 132 F. 2d 413 (C. A. 2) as being in conflict with the decision below. Both cases are clearly consistent with our position in that circumstances were brought to the courts' attention that indicated that conspiracies to obstruct justice were alleged to be involved. Thus although the questions were not dissimilar to those asked in the present case, the courts were given sufficient facts so that they could determine that the answers might endanger the the witnesses. The cases dealing with relationships with, or knowledge of, Communists which are cited by the petitioner do not support his position. *Blau* v. *United States,* 340 U. S. 159; *Estes* v. *Potter,* 183 F. 2d 865, 867 (C. A. 5), certiorari denied, 340 U. S. 920; *Alexander* v. *United States,* 181 F. 2d 480 (C. A. 9). Sufficient circumstances were presented to the courts in each of these cases to indicate that the government was attempting to identify Communist Party officials and to locate membership lists. In view of the prosecutions which were pending in New York under the Smith Act it was held that the answers to the questions would furnish a link in the chain of evidence necessary to prosecute the witnesses themselves for violations of the Smith Act.

It should be noted that the additional showing made in the petition with respect to bail (discussed in Point III) would have added nothing to the showing made as to these questions at the time of the contempt hearing. The witness's reputation as an underworld character has no connection with the questions with respect to Weisberg's whereabouts. The fact that the government had requested a bench warrant for Weisberg was already known to the court since the application had been to the very judge sitting at the time of the contempt hearing; it had been opposed on the ground that there had been no showing that Weisberg was evading service of the subpoena. (R. 15) The opinion of the court below that the showing, if made at a proper time, would have been sufficient to sustain the claim of privilege was addressed specifically to the questions relating to the witness's occupation and had no reference to the questions under consideration (R. 28). The court made no such observation in discussing the questions as to Weisberg (R. 25-26).

Finally, petitioner makes the contention that the existence of privilege with respect to the refusals to testify concerning Weisberg was "really moot" since Weisberg voluntarily appeared before the grand jury. (Br. 10) Weisberg appeared after petitioner's commitment but before the motion for bail and argument on appeal (Pet. 11-12;

Br. 10).[7] The argument is without merit. It is sufficient to note that Weisberg had not made his appearance at the time petitioner refused to testify and at the time of commitment. The contempt was then complete. To set aside the contempt judgment on the ground of later occurrences would introduce into the proceeding, which was for criminal contempt under 18 U. S. C. 401 and Rule 42 (a) of the Federal Rules of Criminal Procedure, an element quite foreign to the offense involved.

III

THE COURT BELOW PROPERLY REFUSED TO CONSIDER THE SHOWING MADE ON THE APPLICATION FOR RECONSIDERATION OF BAIL AS PART OF THE RECORD AND PROPERLY REFUSED TO REMAND THE CASE.

Petitioner argues that the showing made to the district court on an application for reconsideration of allowance of bail pending appeal was sufficient to sustain his claim of privilege with respect to the questions as to his occupation, and that the court below should have considered it in support of the privilege or, at least, have remanded the case to the district court in order that the petitioner might have the opportunity of presenting it formally to that court (Br. 8-10).

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[7] The facts as to the appearance of Weisberg are not properly in the record; they appear only in petitioner's briefs. And there is nothing whatsoever in the record or in the Government's brief below to support petitioner's statement (Pet. 12; Br. 10) that "All parties assumed that this group of questions was out of the case."

A bare statement of the sequence of events makes it apparent that the matter presented on the bail application was not properly a part of the record on appeal and was therefore properly stricken. On October 5, 1950, petitioner was found guilty of contempt, was sentenced, applied for bail (which was denied), and filed a notice of appeal (R. 1). On October 6, 1950, the entire record of the proceedings was forwarded to the Court of Appeals, where it was docketed on October 11 (R. 20). On October 20, fifteen days after the appeal had been taken, petitioner filed his application for reconsideration of bail and attached to it the materials which he now asserts should have been considered by the Court of Appeals. It should further be noted that at the time of this application the five day period allowed by Rule 33 of the Federal Rules of Criminal Procedure for applying for a new trial in the district court had expired. Thus the district court had no authority to treat the motion as a motion for a new trial.

The Court of Appeals was, of course, required to consider the case on the basis of the record made below. *Edwards* v. *United States*, 312 U. S. 473. Since the matter had not been a part of the record on which the district court had found the petitioner in contempt, it was entirely proper for the court to strike the matter from the record. Rule 39 of the Rules of Criminal Procedure.

The question then arises whether the court, since the matter had been brought to its attention, although informally, should have remanded the case to the district court in order that the showing might there be made. We submit that there was clearly no abuse of discretion in refusing to do so.

In essence, the request for remand amounts to no more than an assertion that petitioner believes that he can try his case better if he is given another chance. This is not a case of newly discovered evidence. It is merely a situation where petitioner, as was his right, chose not to present certain facts to the court below,[8] and, having been unsuccessful in the first trial, would like to have an opportunity to see if he would have better luck if he tried the case in another manner. There are always questions of trial technique facing a defendant, always questions of judgment whether it will help or hurt him to present various matters to the court. If the fact that he later wished to reconsider his prior unsuccessful strategy were ground for a remand, there would never be any end to litigation.

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[8] The record indicates that the court stated on October 4 that it had no background knowledge on which it could assume a real danger to petitioner (R. 19). Therefore petitioner was clearly not justified in assuming that the court was aware of the facts later furnished (Br. 8). The contempt trial was not held until the next day and the petitioner had the opportunity at that time to lay before the court the background which the court had stated was necessary.

Petitioner clothes his argument in terms of waivers of rights and cites *Johnson* v. *Zerbst*, 304 U. S. 458, to support him (Br. 9). While any choice between alternative courses of action is in a sense a waiver of the courses not adopted, there is no resemblence between such a choice and the waiver of a constitutional privilege such as was referred to in the *Johnson* case. Far from waiving his constitutional rights against self-incrimination, petitioner has been stoutly asserting them throughout.

Finally, even if it be assumed that there would have been reason to remand the case for a new trial, if the questions concerning the petitioner's occupation were the only ones concerned, there was no basis for a remand in the present case because the additional showing had little, if any, relevance to the questions relating to Weisberg. As pointed out above (page 22, *supra*) the conviction would have had to be sustained if petitioner had no privilege to refuse to answer any of the questions asked him. On this ground alone, the court below properly refused to remand the case.

CONCLUSION

For the foregoing reasons, the conviction of contempt should be affirmed.

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